June 2016

Volume 8 Issue 2

Land and Environment Court of NSW

Judicial Newsletter

Legislation

Statutes

Local Government and Elections Legislation Amendment (Integrity) Act 2016 – commenced 1 July 2016:

(a) amended the *Election Funding, Expenditure and Disclosures Act 1981* to impose caps on political donations in respect of local government elections;

(b) amended the *Local Government Act 1993* to disqualify a person from holding civic office if the person has been convicted of an offence against the *Election Funding, Expenditure and Disclosures Act* 1981 relating to unlawful political donations or the failure to disclose donations or electoral expenditure, or has been convicted of an offence of any kind that is punishable by imprisonment for 5 years or more;

(c) repealed section 448(g) of the *Local Government Act 1993*, which exempts councillors and senior officers from the requirement to disclose pecuniary interests in relation to certain planning matters;

(d) enabled the Chief Executive of the Office of Local Government to apply to the Supreme Court for an order to recover, from a councillor who has been found to have contravened the disclosure obligations of the *Local Government Act 1993*, the amount of any monetary benefit obtained by the councillor as a result of the decision to which the contravention relates;

(e) made changes to development application forms under the *Environmental Planning and Assessment Act 1979* so that an applicant is required to disclose whether the applicant, or any other person having a financial interest in the application, is a councillor or council general manager, or a spouse or relative of a councillor or general manager (a failure to disclose would constitute an offence under section 148B of that Act);

(f) made changes to delegations and gateway determination procedures under that Act that authorise local councils to make local environmental plans concerning permissible development so that a councillor or council general manager who has a financial interest in the plan does not take part in the making of the plan; and

(g) made changes to the model code of conduct for councillors under the Local Government Act 1993 to ensure that councillors do not participate in council decisions relating to the determination of development applications made by them or by the council general manager or in which they have a financial interest.

The *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016*, assented to on 22 March 2016 and to commence on a day or days to be proclaimed, amends the *Inclosed Lands Protection Act 1901*, the *Crimes Act 1900* and the *Law Enforcement (Powers and Responsibilities) Act 2002* in relation to interference with mining and other businesses or undertakings.

Schedule 2 [41] of the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* No 41 commenced on 16 March 2016. It amended the *Petroleum (Onshore) Act 1991* concerning the cancellation of petroleum titles relating to national parks.

Statute Law (Miscellaneous Provisions) Act 2016, assented to on 7 June 2016, also made a number of minor amendments to the *Mining Act 1992*, *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015*, and the *Petroleum (Onshore) Act 1991* and *Petroleum (Offshore) Act 1982*.

Regulations

- Planning:

1. Extension of the life of certain regulations

Statute Law (Miscellaneous Provisions) Act 2016 – assented 7 June 2016.

Of most importance to users of this Court, Schedule 1.28 amends Schedule 5 of the Subordinate Legislation Act 1989 by inserting a list of statutory rules that remain in force until 1 September 2017 (unless sooner repealed). Three of the regulations whose life has been extended are the *Environmental Planning and Assessment Regulation 2000*, the *Local Government (General) Regulation 2005* and the *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Movable Dwellings) Regulation 2005*. The explanatory note for these provisions indicates that the relevant parent legislation for each of these regulations is currently under review. In each instance, the explanatory note observes that it is considered that it would be premature to remake the relevant regulation until after the relevant review process has been completed.

Schedule 1 also contains a number of minor amendments to the *Mining Act 1992*, *Petroleum (Onshore) Act 1991* and *Petroleum (Offshore) Act 1982*.

The provisions noted above have come into force.

2. Other changes to Planning Regulations

Environmental Planning and Assessment Amendment (Loose-fill Asbestos Insulation) Regulation 2016 — published 16 June 2016, requires a planning certificate relating to land that includes residential premises listed on the register under Division 1A of Part 8 of the *Home Building Act 1989* to include a statement that the premises are listed on that register. That register lists residential premises that contain or have contained loose-fill asbestos insulation. [see also PS16-001 released by the Department of Planning and Environment]

Home Building Amendment (Loose-fill Asbestos Insulation) Regulation 2016 — published 27 May 2016, amended the *Home Building Regulation 2014* to:

(a) specify how the presence of loose-fill asbestos insulation (LFAI) at premises is to be verified, for the purposes of the requirement in Division 1A of Part 8 of the *Home Building Act 1989* that residential premises be listed on the register (the LFAI Register) under that Division if the Secretary is satisfied that the presence of LFAI at those premises has been verified in accordance with the regulations;

(b) prescribe the circumstances in which residential premises at which the presence of LFAI has not been verified in accordance with the regulations may be listed on the LFAI Register;

(c) prescribe the places where signs at residential premises warning about the presence of LFAI must be displayed and other requirements relating to those signs; and

(d) provide for offences relating to those signs to be dealt with by penalty notices.

Environmental Planning and Assessment Amendment (Siding Spring Observatory) Regulation 2016 — published 10 June 2016, amended the *Environmental Planning and Assessment Regulation 2000*:

(a) to require a consent authority to take into consideration the Dark Sky Planning Guideline prepared by the Secretary of the Department of Planning and Environment when determining a development application for:

  (i) development on land within the local government areas of Coonamble, City of Dubbo, Gilgandra or Warrumbungle Shire (being the local government areas closest to the Siding Spring Observatory near Coonabarabran); or

  (ii) regional development, State significant development or designated development on land within 200 kilometres of the observatory; and

(b) to require a proponent to take into consideration the Dark Sky Planning Guideline when preparing an environmental impact statement for State significant infrastructure on land within 200km of the observatory;

(c) to provide that a certifying authority cannot issue an occupation certificate in relation to a dwelling house, dual occupancy or secondary dwelling that is complying development on land within the local government areas of Coonamble, City of Dubbo, Gilgandra or Warrumbungle Shire unless certain standards are met with respect to outside lighting so as to limit the amount of light pollution generated by such buildings in order to protect the observing conditions at the observatory; and

(d) to include a savings and transitional provision and to make statute law revision amendments.

Standard Instrument (Local Environmental Plans) Amendment (Observatory and Defence Facility) Order 2016 — published 10 June 2016, amends the Standard Instrument (Local Environmental Plans) Order 2006 to insert:

(a) cl 4A, providing that optional provisions may be compulsory in certain cases; and

(b) optional cl 5.14, making provision to protect observing conditions at the Siding Spring Observatory by promoting lighting practices that minimise light pollution, including a requirement for development consent for all lit development of land within 18km of the observatory; and

(c) optional cl 5.15, relating to the defence receiver station on land near Morundah.

Environmental Planning and Assessment Amendment (Transitional) Regulation 2016 — published 3 June 2016, amends the transitional arrangements in Schedule 6A to the *Environmental Planning and Assessment Act 1979* following the repeal of Part 3A of that Act, including in relation to approval of concept plans.

Standard Instrument (Local Environmental Plans) Amendment Order 2016 — published 11 March 2016 made changes to the land use tables for Zone B7 Business Park, Zone IN1 General Industrial and Zone IN2 Light Industrial, and to amend the definition of "building height" and "livestock processing industry".

Local Environmental Plan (Greater Sydney LEPs Consequential Amendments) 2016 — which commenced on 4 April 2016, amends the land use tables in Zone B7 Business, Zone IN1 General Industrial or Zone IN2 Light Industrial in 12 local environmental plans.

Local Environmental Plan (Regional LEPs Consequential Amendments) 2016 — which commenced on 4 April 2016, amends the land use tables in Zone IN1 General Industrial and Zone IN2 Light Industrial for a number of specified local environmental plans.

The Department of Planning and Environment has released PS 16-002 which outlines current and future amendments to planning instruments.

- Local Government:

Local Government (Council Amalgamations) Proclamation 2016 — published 12 May 2016 at 12.10 pm, various local government areas to constitute 17 new councils, and provided consequential savings and transitional provisions relating to governance, council activities, staff, and transfer of assets and liabilities.

Local Government (City of Parramatta and Cumberland) Proclamation 2016 — published 12 May 2016 at 12.10 pm, created 2 new local government areas, the City of Parramatta area and the Cumberland area from the former Cities of Parramatta, Auburn and Holroyd. This Proclamation also contains savings and transitional provisions consequential on those changes.

Local Government (General) Amendment (Preparation of Rolls) Regulation 2016 — published 25 May 2016, prescribe as penalty notice offences the offences of refusing or failing to answer a question, or providing a false or misleading answer to a question, relating to the preparation of the non-residential roll electoral information register.

Local Government (General) Amendment (Candidate Information) Regulation 2016 — published 3 June 2016:

(a) provides that a candidate for civic office at a local government election must declare in their nomination papers whether the candidate is a property developer or a close associate of a corporation that is a property developer;

(b) makes it clear that a nomination paper is not valid unless the person proposed for nomination has completed the candidate information sheet that is required to accompany the nomination; and

(c) provides that a returning officer at an election administered by a general manager of a council, after the election has been declared, is to make copies of nomination papers received by the officer and send those copies to the Electoral Commissioner.

- Criminal:

Crimes (Sentencing Procedure) Amendment (Prescribed Persons) Regulation 2016 — published 3 June 2016, prescribes the Secretary of the Department of Planning and Environment as a person who may sign a list of additional offences to be taken account of in criminal proceedings where a court finds an offender guilty of an offence, under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act* 1999.

Courts Legislation Amendment (Disrespectful Behaviour) Act 2016 – assented to on 7 June 2016 and to commence on a day or days to be proclaimed, amends the *Land and Environment Court Act 1979* to insert s 67A, under which it is an offence for a person who is an accused person or defendant in, or a party to, proceedings before the Court or has been called to give evidence in proceedings before the Court, to intentionally engage in behaviour disrespectful to the Court or the Judge presiding over the proceedings (according to established court practice and convention) in the Court during the proceedings. Section 67A does not affect any power with respect to contempt or the exercise of any such power, and does not apply in Class 1, 2, 3 or 4 of the Court's jurisdiction.

- Mining and Petroleum:

Mining Legislation Amendment (Saving of Existing Conditions) Regulation 2016 — published 15 April 2016, and taken to have commenced on 1 March 2016:

(a) modified savings provisions made consequent on the enactment of the *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015* to provide that each condition of certain existing approvals of activities (which the savings provisions deem to be activity approvals required under the amended Act) is taken to be a term of the deemed activity approval; and

(b) provided that land over which an exploration (mineral owner) licence or an exploration licence is granted in respect of a Group 9A mineral (oil shale) may be of any shape or size (in the same way as for Group 9 minerals).

Petroleum (Onshore) Amendment (Saving of Assessment Lease Conditions) Regulation 2016 — published 15 April 2016, and taken to have commenced on 1 March 2016, saves the operation of conditions of existing assessment leases that required a petroleum operations plan to be approved before an activity that is now an assessable prospecting operation could be carried out, consequential on the

insertion of section 36A into the *Petroleum (Onshore) Act* 1991 by the *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015*.

The *Mining Regulation 2010*, *Petroleum (Onshore) Regulation 2007*, and the *Petroleum (Offshore) Regulation 2006* are due for repeal on 1 September 2016. The Regulatory Impact Statement and the draft *Mining Regulation 2016* and *Petroleum (Onshore) Regulation 2016* were released for public exhibition and comment for 28 days until 29 June 2016.

- Pollution:

Protection of the Environment Operations (General) Amendment (Risk-based Licensing) Regulation 2016 – published 24 June 2016, amends certain uncommenced amendments to the *Protection of the Environment Operations (General) Regulation 2009* that were due to commence on 1 July 2016 and an existing provision of that Regulation:

(a) to extend the time for payment of the administrative fee comprised in an annual licence fee to not later than 120 days (rather than 90 days) after the beginning of the licence fee period to which it relates;

(b) to extend the time for payment of the load-based fee comprised in an annual licence fee to not later than 120 days (rather than 90 days) after the end of the licence fee period to which it relates; and

(c) to change the time for payment of the administrative fee for a licence fee period that is adjusted as a consequence of the Environment Protection Authority (EPA) redetermining the environmental management category for the licence holder to not later than 60 days after the redetermination is made (rather than 60 days after the redetermination is notified to the licence holder).

Protection of the Environment Operations (Waste) Amendment (Calculation of Contributions) Regulation 2016 – published 24 June 2016, amends the *Protection of the Environment Operations (Waste) Regulation 2014* to extend the end date for the 50% concessional rate for residual waste generated directly from the shredding of scrap metal from 30 June 2016 to 30 June 2018.

- Water:

Water Management (Application of Act to Certain Water Sources) Proclamation 2016 – made on 22 June 2016 and commencing on 1 July 2016, applies Parts 2 and 3 of Chapter 3 of the *Water Management Act 2000* to:

(a) the water sources to which any of 10 specified water sharing plans apply, and in relation to the categories and subcategories of access licences and approvals relating to those water sources other than floodplain harvesting access licences, drainage work approvals and aquifer interference approvals;

(b) all alluvial groundwater within all water sources to which the Water Sharing Plan for the Central Coast Unregulated Water Sources 2009 applies and in relation to the categories and subcategories of access licences and approvals relating to the alluvial part of those water sources other than drainage work approvals and aquifer interference approvals;

(c) all alluvial groundwater within the Karuah River Water Source to which the Water Sharing Plan for the Lower North Coast Unregulated and Alluvial Water Sources 2009 applies and in relation to the categories and subcategories of access licences and approvals relating to the alluvial part of that water source other than drainage work approvals and aquifer interference approvals;

(d) the Coopers Creek Alluvial Groundwater Source to which the Water Sharing Plan for the Richmond River Area Unregulated, Regulated and Alluvial Water Sources 2010 applies and in relation to the categories and subcategories of access licences and approvals relating to that water source other than drainage work approvals and aquifer interference approvals; and

(e) the Cotter Water Source to which the Water Sharing Plan for the Murrumbidgee Unregulated and Alluvial Water Sources 2012 applies and in relation to the categories and subcategories of access licences and approvals relating to that water source other than floodplain harvesting access licences, drainage work approvals and aquifer interference approvals.

Water Management (General) Amendment (Access Licence) Regulation 2016 – published 24 June 2016 to commence on 1 July 2016, amends the *Water Management (General) Regulation 2011* to:

(a) prescribe a major utility (Barnard) access licence as a new category of access licence and to provide that the access licence is a specific purpose access licence; and

(b) exempt persons who take water for the purposes of watering plantations of sugar cane from the requirement to hold an access licence if the water is taken from a sunken artificial channel constructed to drain water from the land on which the cane is grown and the channel is located in an area to which the Water Sharing Plan for the Clarence River Unregulated and Alluvial Water Sources 2016 or the Water Sharing Plan for the Brunswick Unregulated and Alluvial Water Sources 2016 applies.

- Miscellaneous:

Conveyancing (Sale of Land) Amendment (Swimming Pools) Regulation 2016 — published 24 March 2016, and commenced on 29 April 2016, amended the *Conveyancing (Sale of Land) Regulation 2010* in relation to the prescribed documents required to be attached to a contract of sale of certain land with a swimming pool.

Residential Tenancies Amendment (Swimming Pools) Regulation 2016 — published 24 March 2016, and commenced on 29 April 2016:

(a) provides that a landlord must ensure, in the case of residential tenancy agreement entered into after 29 April 2016, that any swimming pool on the residential premises is registered under the *Swimming Pools Act 1992* and a certificate that the pool complies with that Act is provided to the tenant; and

(b) excludes from this requirement swimming pools that are situated on land in a strata or community scheme that comprises more than 2 lots.

Swimming Pools Amendment (Inspections) Regulation 2016 — published 24 March 2016 and commenced on publication, amended the *Swimming Pools Regulation 2008* in relation to the inspection and compliance of swimming pools on purchased premises.

Building Professionals Amendment (Accredited Certifiers) Regulation 2016 - published 6 May 2016, amended the *Building Professionals Regulation 2007* to enable accredited certifiers who have been involved in the carrying out of work on a swimming pool to issue a certificate of compliance under section 22D of the *Swimming Pools Act 1992* for that swimming pool in certain circumstances.

Acts assented to but not yet in force

Biosecurity Act 2015, which provides a framework to deal with biosecurity risks, to promote biosecurity is a shared responsibility of government, industry and communities and to provide a framework for the timely and effective management of a range of potential biosecurity threats. It also provides a framework for implementation of biosecurity agreements to which the State is a party and the meeting of biosecurity requirements in other jurisdictions so as to maintain market access for industry.

Coastal Management Act 2016, which makes provision for the ecologically sustainable management, use and occupation of the New South Wales coast, and for related purposes was assented to on 7 June 2016, and commences on a day or days to be proclaimed.

Strata Schemes Development Act 2015, which makes provision for the creation of cubic space freehold and leasehold strata schemes, the way in which lots in common property in strata schemes may be dealt with and for the variation, termination and renewal of strata schemes.

State Environmental Planning Policies [SEPP)

SEPP Amendment (Permissible Land Uses) 2016 — published 11 March 2016, amended permissible land uses for State significant sites.

SEPP (Major Development) Amendment (Greystanes Southern Employment Lands) 2016 — published 16 March 2016, made changes to land use in the Greystanes area.

SEPP (State and Regional Development) Amendment (Maps) 2016 — published 18 March 2016, amended the SEPP (State and Regional Development) 2011 to make it clear that a reference in clause 5 (maps) to an environmental planning instrument includes a reference to an order of the Minister that amends an environmental planning instrument.

SEPP Amendment (Correctional Facilities) 2016 — published 18 March 2016, made changes to two SEPPs in respect of new correctional facilities.

SEPP (Major Development) Amendment (State Significant Precincts) 2016 — published 24 March 2016, changed the name of SEPP (Major Developments) 2005 to SEPP (State Significant Precincts) 2005.

SEPP (Integration and Repeals) 2016 – published 10 June 2016, and commencing 56 days after publication:

(a) repeals a number of state environmental planning policies and regional environmental plans;

(b) amends a number of local environmental plans to make provision for rural land sharing communities;

(c) transfers provisions from repealed regional environmental plans to local environmental plans;

(d) inserts provisions in specified local environmental plans relating to Siding Springs Observatory and the defence receiver station established by the Commonwealth Department of Defence on land near Morundah; and

(e) makes miscellaneous amendments to a number of local environmental plans.

SEPP (Western Sydney Employment Area) Amendment 2016 – published 24 June 2016, amends the maps adopted by the Penrith Local Environmental Plan 2010 and State Environmental Planning Policy (Western Sydney Employment Area) 2009.

SEPP (Western Sydney Employment Area) Amendment (Industrial Area) 2016 – published 24 June 2016, amends the maps adopted by State Environmental Planning Policy (Western Sydney Employment Area) 2009.

On Exhibition

Biodiversity Conservation Bill 2016 seeks to provide a new legislative framework "to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development". The specific purposes of the bill are stated to be, in particular:

(a) "to conserve biodiversity and ecological integrity at bioregional and State scales, and

(b) to facilitate ecological sustainable development, and

(c) to improve and share knowledge, including local and aboriginal knowledge, about the status and values of biodiversity and of ecosystem services and the effectiveness of conservation actions".

Local Land Services Amendment Bill 2016 seeks to repeal the *Native Vegetation Act 2003*; and to amend the *Local Land Services Act 2013* in relation to native vegetation land management in rural areas.

Public submissions on both bills closed on 28 June 2016.

Court Practice and Procedure

As of 23 June 2016, the Land and Environment Court started using JusticeLink. Information on changes to procedures for orders, the Online Court and the NSW Online Registry is available on the Court's website.

Land and Environment Court (Amendment No 2) Rule 2016 — commenced 20 May 2016. It amended the *Land and Environment Court Rules 2007*:

(a) to apply Part 3 (Electronic case management) of the *Uniform Civil Procedure Rules 2005* to proceedings in Class 5, 6 or 7 of the jurisdiction of the Land and Environment Court: and

(b) to limit the application of rule 7.6 relating to the entry of judgments and orders of the Court to those that were given or made before the commencement of this Rule because judgments and orders can now be entered in accordance with rule 36.11 of the Uniform Civil Procedure Rules 2005.

Uniform Civil Procedure (Amendment No 76) Rule 2016 — published 20 May 2016

The object of this Rule is to amend the *Uniform Civil Procedure Rules 2005* to reflect that the electronic case management system known as Online Registry is now authorised for use in the Land and Environment Court.

Electronic Transactions (ECM Courts) Amendment (Land and Environment Court and Industrial Relations Commission) Order 2016 — published 8 April 2016

The objects of this Order are:

(a) to authorise the use of JusticeLink for certain purposes in connection with civil and criminal proceedings in the Land and Environment Court, and

(b) to authorise the use of e-Court in proceedings in all classes of the jurisdiction of the Land and Environment Court, and

(c) to authorise the use of Online Registry for certain purposes in connection with civil and criminal proceedings in the Land and Environment.

Judgments

United Kingdom

R v Thames Water Utilities Ltd [2015] EWCA Crim 960 [2015] 1 WLR 4411 (Lord Thomas CJ, Mitting and Lewis JJ)

Facts: Thames Water Utilities Ltd (the "Appellant") appealed against a fine of £250,000 imposed for the unlawful discharge of untreated sewage into a brook and, consequently, a National Trust nature reserve within an "Area of Outstanding Natural Beauty". The Appellant pleaded guilty to an offence contrary to the relevant regulations at the first opportunity. Since 1991, the Appellant had been convicted on 106 occasions of 162 environmental offences. As the first case to be heard following the commencement of the Sentencing Council's definitive guideline (the "guideline"), the Court provided guidance on the fines to be imposed for environmental offences committed by very large commercial organisations

Issues:

(1) Whether the £250,000 imposed by the Crown Court on the Appellant should be set aside.

Held: Appeal dismissed:

(1) In determining a sentence for very large commercial organisations, the starting point is to consider the general sentencing principles set out in the *Criminal Justice Act 2003*: at [33];

(2) As per the guideline, the object of sentencing is to bring home the appropriate message to the directors and shareholders of the company. If the offender is a repeat offender, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures to properly reform themselves and fulfil their environmental obligations: at [42]. Sentences imposed in a large number of cases have not been adequate to achieve this object: at [38];

(3) Previous convictions are always relevant aggravating features and, sometimes, seriously aggravating features. Offences resulting from negligence or worse should count as significantly more serious: at [39];

(4) All relevant mitigating features must be taken into account including: prompt and effective measures to rectify the harm, frankness and co-operation with the authorities, prompt payment of full compensation to those harmed and a prompt guilty plea: at [41];

(5) The Appellant's negligence caused local harm and the Appellant's history of environmental offences was highly relevant. Although not indicative of a routine disregard of its environmental obligations, the Appellant's record did leave room for substantial improvement: at [43]-[44];

(6) In the circumstances of the case, the fine imposed by the Crown Court was lenient and the Court would have had no hesitation in upholding a very substantially higher fine: at [46].

Federal Court of Australia

Esposito v Commonwealth of Australia [2015] FCAFC 160 (Allsop CJ, Flick and Perram JJ)

(related decisions *Esposito v Commonwealth of Australia* [2014] FCA 1440 (Foster J); *Esposito v Commonwealth of Australia* [2015] FCA 3 (Foster J))

Facts: Mr Esposito, along with four other Appellants, were representative members of a class action in which all members owned or had owned allotments of land in an area called Heritage Estates ("Heritage Estates"). When the allotments were originally purchased in the late 1980s their zoning did not permit

building residential dwellings. In May 2007, Shoalhaven City Council ("Council") sought approval from the Commonwealth Minister for the Environment ("the Minister") under the Environment Protection and Biodiversity Conservation Act 1999 ("EPBC Act") to rezone the land and to build necessary infrastructure. The Minister's approval was sought because four threatened species listed under the EPBC Act were located on the Heritage Estates. In March 2009 the Minister refused to approve either application. Subsequently, in 2011, following an application by the Council to the Minister, a written inter-government agreement was reached between the Commonwealth and the State of New South Wales ("NSW"), in which the Commonwealth granted $6,042,740 to the Foundation for National Parks and Wildlife ("Foundation") to voluntarily (as opposed to compulsorily) acquire landowners' allotments, initially for $5,500, and after October 2012 for $5,000. The actual land value of the allotments was $0 to $500. The Applicants brought the suit against the Commonwealth, the Minister, NSW, the Council, and the Foundation for acquiring its property. At first instance the application was dismissed.

Issues:

(1) Whether the Minister's decision to refuse the Council's application amounted to an acquisition of property without it providing just terms contrary to s 51(xxxi) of the Constitution;

(2) Whether the inter-government agreement which made the grant to the Foundation was intended to circumvent the Commonwealth's constitutional obligation to acquire property on just terms; and

(3) Whether the jurisdiction of the EPBC Act extended over the power to zone or rezone land.

Held: Dismissing the appeal with costs.

(1) The decision by the Minister to refuse the Council's application to build infrastructure did not constitute an acquisition of property: at [59]-[60];

(2) The commencement of the EPBC Act in 2000 was the date on which additional prohibitions, requiring the Minister's approval, arose. The Minister's decision in 2009 to refuse the Council's application was not the imposition of a fresh prohibition but a decision not to lift an existing prohibition: at [31]-[32];

(3) Section 133(1) of the EPBC Act which authorises the Minister to approve a controlled action is not contrary to s 51(xxxi) of the Constitution because s 519 of the EPBC Act provides that where an acquisition of property occurs this must be on just terms: at [39]-[41];

(4) The Appellants were required to show that there had been an acquisition of property: at [46]. When the Appellants purchased the land, the zoning prohibited building residential dwellings. The allotments were therefore already largely sterilised by State law: at [21]. Neither the enactment of the EPBC Act, nor the Minister's refusal had the effect of acquiring the Appellant's rights over their land: at [57];

(5) Even if the Minister's decision denied the Appellants the future possibility of zoning changes which would diminish the value of the allotments, a hope whether well-founded or unrealistic is not a species of property: at [59]. Further, s 51(xxxi) only relates to acquisitions of property and not diminutions of value: at [60];

(6) The inter-government agreement was not intended to circumvent the Commonwealth's constitutional obligation to acquire property on just terms. NSW did not use any of its powers to acquire the land compulsorily, nor was it required to do so under the agreement, which is essential for the s 51(xxxi) to apply: at [67]. Whilst an apparently voluntary disposal of property may in fact constitute an involuntary acquisition, in this case what was presented was a choice between a modest offer and the unpalatable prospect of keeping land which was sterilised for the foreseeable future by the EPBC Act: at [70];

(7) The evidence relating to the inter-government agreement indicated that it occurred in 2011 following the Council's application to the Minister, two years after the Minister's refusal. This evidence did not support the allegation that there was a single decision between the Commonwealth, NSW and the Council: [77]-[78];

(8) The Minister's purported refusal of the Council's application to rezone the land was ultra vires: at [108]. The prohibitions contained in the EPBC Act only regulate actions. Whilst building infrastructure amounted to an action as defined in s 523 of the EPBC Act, the rezoning of land which involves amending a local environment plan ("LEP") did not. The exercise of State legislative power to create or amend a LEP merely empowers a council to grant approval to future developments: at [103];

(9) The purported refusal to rezone the land was severable from the balance of the Minister's decision: at [110]; and

(10) Declaratory relief in relation to the Minister's purported refusal to allow the Council to rezone the land was refused. Declaratory relief is discretionary. In this instance, the delay in bringing this application separate to the unsuccessful s 51(xxxi) application, and that given it would achieve nothing, weighed against granting it. Despite this, the State Planning Minister was still at liberty to rezone the land: at [119].

NSW Court of Appeal

Botany Bay City Council v Minister for Local Government [2016] NSWCA 74 (Bathurst CJ, Beazley P, Ward JA)

First instance LEC decision: *Botany Bay City Council v Minister for Local Government* [2016] NSWLEC 35 (Pain J)

Facts: On 6 January 2016 the Minister for Local Government ("the Minister") initiated a proposal for the amalgamation of Botany Bay City Council ("the Council") with Rockdale City Council. The Minister's proposal was referred pursuant to s 218F of the *Local Government Act* 1993 ("the LG Act") to the Third Respondent, the Chief Executive of the Office of Local Government ("the Chief Executive") for examination and report. The Chief Executive made a delegation of functions to the Fourth Respondent ("the Delegate"). The Delegate invited submissions by and discussions with the Council, and the Council made submissions on 28 February 2016 and 3 March 2016. On 11 March 2016 the Council lodged its own proposal with the Minister pursuant to s 218F, that the Council be amalgamated with only particular parts of Rockdale Council and with parts of Randwick Council and Sydney City Council, and requested that it be referred to the Delegate. On 18 March 2016 the Council was advised that the proposal had been referred to the Delegate.

The Council commenced judicial review proceedings in the Land and Environment Court on 23 March 2016, seeking declaratory and other relief to the effect that the Delegate and the Chief Executive were required to have regard to the Council proposal in the examination and report of the Minister's proposal. The summons was dismissed at first instance and the Council appealed, contending that the Council proposal was a mandatory relevant consideration and that there was, or would be, a denial of procedural fairness. It was common ground amongst the parties both at first instance and on appeal that the Council proposal had not been incorporated into that aspect of the Delegate's examination which related to the Council and Rockdale Council, and that examination and report of the Council proposal had not been the subject of a specific delegation by the Chief Executive under s 745(1) of the LG Act.

Issues:

(1) Whether the primary judge erred in finding that the Delegate was not authorised to consider other amalgamation proposals:

(2) Whether the primary judge erred in her construction of s 263 of the LG Act;

(3) Whether the primary judge erred in finding that there was no denial of procedural fairness in the process adopted by the Delegate;

(4) Whether the primary judge erred in finding that the Council's complaints against the Chief Executive concerning the Council proposal were not justified; and

(5) Whether the primary judge erred in finding that there was no breach or apprehended breach of the LG Act.

Held: Dismissing the appeal with costs:

(1) Section 263(1) of the LG Act required the Boundaries Commission or the Chief Executive "to examine and report of any matter with respect to the boundaries of local government areas which may be referred to it by the Minister". While the phrases "any matter" and "with respect to" were of wide import, the meaning of s 263(1) was more confined. What falls within s 263 for examination and

report is any matter with respect to boundaries that is referred by the Minister, and in this case, that was the Minister's proposal: at [38];

(2) Section 263(3) then provided that the factors specified in paragraphs (a)-(f) must be considered "when considering any matter referred to it that relates to the boundaries". The reference in s 263(3) to "any matter referred" was a reference to that which was referred pursuant to subsection (1): at [39];

(3) The precise meaning of the word "matter" did not have to be determined for present purposes as s 263(1) was clear on its terms that an examination and report is only in respect of any matter referred to the Boundaries Commission or the Chief Executive: at [43]. The reasons of the primary judge in relation to s 263 accorded with that construction: at [44];

(4) The Council's submission that its submission to the Delegate as well as the Council proposal concerned the "areas" in the Minister's proposal referred to the Delegate for consideration under the delegation by the Chief Executive was rejected: at [45];

(5) Even if that submission were accepted that would not make the Council proposal a mandatory consideration under s 263(3)(f) of the LG Act which provides that it is a matter for the Delegate to determine what other factors are relevant: at [46];

(6) There was nothing in the primary judge's reasons to suggest that in determining whether the Council was entitled to relief she dealt with anything other than the Council proposal, and nothing that could be read as stating that the Council's submission to the Delegate could not be taken into account on the examination and report to the Minister. Nor was there anything in the primary judge's reasons to the effect that the Delegate could not consider a submission that proposed some alternative arrangement in relation to the boundaries of the councils the subject of the Minister's proposal: at [49]; and

(7) The Council proposal was not relevantly before the Delegate and had been lodged by way of submission to the Delegate within the timeframe for submissions: at [51]. There was no lack of procedural fairness as the proceedings before the primary judge did not concern the Council submission to the Delegate and in any event, the Delegate informed the Council he would consider it: at [53].

Valuer-General of New South Wales v Oriental Bar Pty Ltd [2016] NSWCA 48 (Basten and Simpson JJA, Sackville AJA)

First instance LEC decision: *Oriental Bar Pty Ltd v Valuer-General* [2015] NSWLEC 59 (Pain J)

Facts: The Respondent Oriental Bar Pty Ltd is the owner of three properties on which heritage listed buildings are constructed, each used as a hotel and for associated purposes. The Valuer-General ("the VG") determined the land value for each of the properties as at the base dates of 1 July 2010 and 1 July 2012. The Respondents ("the Objectors") lodged objections to the determinations which were allowed in part, and appealed to the Land and Environment Court ("the LEC") pursuant to s 37(1) of the *Valuation of Land Act* 1916 ("the VL Act"). The parties agreed that the proceedings should be conducted by reference to one of the six disputed valuations with the parties being given the opportunity to apply the findings to the other five disputed valuations. The selected disputed valuation was that of the Mountbatten Hotel as at 1 July 2012 ("the Mountbatten Property"). The VG originally determined the land value of that property to be $2,750,000, and on objection the land value was redetermined by the VG to be $2,125,000. That value was derived by applying a value of $2,551 per sqm ("psm") to the gross floor area ("GFA"), estimated to be 833sqm. In the LEC the valuers called by the parties agreed that that estimate was mistaken, and they proceeded on the basis, accepted by the primary judge, that the correct GFA was 675.3sqm. The other properties were affected by similar errors. The VG's valuer assessed the land value to be $2,510,000 whereas the Objectors' valuer assessed the land value to be $700,000, the difference being their selection of comparable sales. The primary judge found that the land value for the Mountbatten Property was $2,500,000, based on the correct GFA for the Mountbatten Property.

The VG's position in the LEC was that if the primary judge accepted that the land value was higher than the VG's determination of $2,150,000 the LEC should reject the appeal and confirm the VG's determination. The primary judge did not confirm the VG's determination, finding that the land value of the Mountbatten Property had to be amended to reflect their actual GFAs, and determined the land value of the Mountbatten Property by applying the rate of $2,551 psm adopted by the VG in the disputed

determination as opposed to the higher psm supported by the VG's evidence in the LEC to the correct GFA. The result was that the primary judge determined that the land value was less than the VG's determination, at $1,722,704, and allowed the appeal and the other five appeals.

The VG appealed, contending that as the only ground of objection that the Objectors had taken or could take was that the VG's determination was too high had to be rejected, there was no alternative but to reject the appeal and confirm the VG's determination. The Objectors cross appealed, submitting that the primary judge was entitled to amend the land value to correct the mistaken estimate of the GFA and that the primary judge had simply exercised the broad power conferred by s 40(1)(b) of the VL Act to make a decision in place of the VGs determination. The primary judge's finding as to the sole comparable sale, a sale of a property with existing use rights and which had the benefit of a development consent ("the Riley Street Property"), was not challenged on the appeal.

Issues:

(1) On the VG's appeal:

(a) whether the primary judge erred in law in finding that notwithstanding her finding that the actual land value was higher than the issued land value, she had power pursuant to s 40 of the VL Act to make an order reducing the land value and upholding the appeals; and

(b) whether the primary judge erred in law in the exercise of her discretion in making the orders to reduce the land value and uphold the appeal in light of her finding that even if the land value was adjusted to take account of the correct GFA the land value would be higher than the issued land value; and

(2) On the cross appeal:

(a) whether the primary judge erred by failing to determine the value of the fee simple in the Mountbatten Property as required by s 6A of the VL Act;

(b) whether the primary judge erred by failing to adjust the land value to account for the Goods and Services Tax ("GST") component of the single comparable sale; and

(3) Whether the primary judge erred in misapplying the provision relating to "land improvements" in s 6A(1) of the VL Act and in consequence overstating the land value to be derived from the only comparable sale on which she relied.

Held: Allowing the appeal, and dismissing the cross-appeal; setting aside the orders of the primary judge and confirming the VG's determinations of land value; and ordering the Respondents/Cross-Appellants to pay the costs of the Appellant/Cross-Respondent of the appeal and cross-appeal:

(1) On the appeal:

(a) Sackville AJA, Simpson JA agreeing:

(i) the proceedings were conducted on the basis that the VG was permitted to adduce valuation evidence that supported a higher value psm than had underpinned the VG's determination, and the primary judge in substance accepted that evidence, making an express finding that the land value of the Mountbatten Property was higher than the VG's determination: at [100];
(ii) the primary judge did not explain why it was appropriate to amend her evidence-based finding as to land value in order to correct the VG's mistake in estimating the GFA: at [104]; and
(iii) the Objectors had not identified any basis on which the primary judge could reasonably have exercised the power in s 40(1)(b) as she did: at [105];

(b) Basten JA:

(i) as the Respondents had failed to demonstrate that the valuations the subject of the appeals were too high, the Appellant failed and an order should have been made dismissing the appeals: at [28]. However, because of the position the VG took there was no question raised as to whether the LEC could reach a valuation higher than that appealed from: at [30]. The appeal was a form of appeal by way of rehearing: at [32]. If the application of a legally correct approach gives rise to a finding that the valuation as determined by the VG is not too high, the power of the court to make a decision involving a lower valuation is not engaged: at [35]; and

(ii) the error upon which the primary judge acted was one identified in the course of the proceedings, and had the proceedings been terminated once that error had been identified that would have involved a failure to exercise the jurisdiction of the Court. To make proper findings of fact in the exercise of jurisdiction and then fail to give effect to those findings by way of the only form of order reasonably open would also constitute an error of law: at [40];

(2) On the cross-appeal:

(a) Sackville AJA, Simpson JA agreeing:

(i) the decision in *Toohey's Ltd v The Valuer General* [1925] AC 439 did not prevent the land value of the subject land being determined by the comparable sales methodology, nor did it prevent a valuer adjusting comparable sales of improved land by deducting the value in improvements from the comparable sales to provide a guide as to the unimproved land value of the subject land: at [128]. The valuers had proceeded on the basis that it was permissible, in determining the value of heritage listed land to consider sales of comparable land with improvements and apply a suitable methodology to assess and deduct the value of the improvements in order to value the land as vacant land, and there was no error in the primary judge accepting that that approach was consistent with s 6A(1) and s 14G(1) of the VL Act: at [129];

(ii) the reasoning in *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53 supported the view that s 14G(1) requires an assumption that the pre-existing use of the actual buildings constructed on the heritage restricted land may be continued and if continuation of that use requires consents and approval they must be assumed to be in place: at [142]. The primary judge's refusal to make a deduction from the adjusted sale price of the Riley Street Property a sum equivalent to the increase in value of that property between November 2011 and November 2012 (after the grant of development consent for use as a restaurant and bar) did not involve an erroneous construction or application of s 6A(1) or s 14G(1) of the VL Act: at [144];

(b) Basten JA: had the value of the development consent and liquor licence applicable to the Riley Street Property been subtracted from that sale, an important point of equivalence would have been removed so that the other sale would no longer be truly comparable, and would not be a proper basis (without some adjustment) for deriving a value of the heritage restricted land. Accordingly there was no error on the part of the primary judge in failing to subtract from the comparable sale the value said to be attributable to that land enjoying the relevant consent and liquor licence needed for it to be truly comparable: at [23];

(c) Sackville AJA, Basten and Simpson JJA agreeing:

(i) it was neither necessary nor appropriate to decide whether the determination of land value may sometimes require a GST component to be excluded. The evidence did not justify a finding that the only comparable sale was materially affected by any liability to pay GST in consequence of the sale, nor a finding that a hypothetical sale of the Mountbatten Property would be materially affected by the operation of the GST Act: at [156]; and

(ii) the primary judge had adopted a value psm that excluded the value of excavation works at the Riley Street Property, and by subsequently adding a sum to reflect that value the primary judge correctly applied s 6A(1) of the VL Act and there was no double counting: at [160].

Supreme Court of NSW

Botany Bay City Council v The State of New South Wales and Minister for Local Government [2016] NSWSC 583 (Garling J)

Facts: On 6 January 2016, the Minister for Local Government (the "Minister") referred a proposal (the "Minister's Proposal") to amalgamate the Plaintiff, Botany Bay City Council (the "Council"), with Rockdale City Council to the Departmental Chief Executive of the Office of Local Government (the "Chief Executive") for examination and report. The Chief Executive delegated his functions in this respect to a delegate, Mr Rod Nockles (the "Delegate"). On 11 March 2016, the Council lodged its own amalgamation proposal (the "Council's Proposal") with the Minister, proposing that it amalgamate with parts of both Rockdale City Council and Randwick City Council. The Council's Proposal was referred by the Minister to

the Chief Executive on 18 March 2016, who subsequently delegated his functions in this respect to a new delegate. On 3 May 2016, the Council commenced proceedings seeking relief against the Minister with respect to the exercise of his powers and duties under the *Local Government Act 1993* (the "Act"). The Council sought orders precluding the Minister from making a recommendation to the Governor on the Minister's Proposal until the completion of the examination of and report on the Council's Proposal. The Council also sought a declaration that procedural fairness required the Minister to provide it with the Delegate's report on the Minister's Proposal (the "Report") and the comments of the Local Government Boundaries Commission (the "Commission") on the Report (the "Comments") and afford it the opportunity to make further submissions on that material. Immediately prior to the delivery of judgment, the Council filed a notice of motion seeking leave to re-open proceedings and file an amended summons, which sought to join the Delegate and the Commission as defendants. On 12 May 2016, the Report and the Comments were made available by the Minister on a publically accessible "Stronger Councils" website.

Issues:

(1) Whether leave should be granted to re-open the proceedings and for the Council to file an amended summons;

(2) Whether the Delegate erred by concluding in the Report that there had not been "a proper campaign of communication and advocacy both in favour and in opposition of the proposal";

(3) Whether the Report was invalid due to the failure of the Delegate to afford the Council procedural fairness in preparing the Report;

(4) Whether the Comments were invalid due to a fundamental misapprehension by the Commission of its statutory functions and powers in dealing with the Report;

(5) Whether the Commission breached an obligation of procedural fairness to the Council;

(6) Whether it was within the Minister's power, pursuant to s 218E of the Act, to make a recommendation to the Governor on the Minister's Proposal prior to the examination and report of the Council's Proposal by a delegate and the review of that report by the Commission; and

(7) Whether the Minister had an obligation to afford procedural fairness to the Council that required the Minister to afford the Council longer than the 7 day period given to it to make further submissions after releasing the Report and the Comments.

Held: Amended summons dismissed; Plaintiff to pay the Defendants' costs:

(1) The interests of justice dictated that the Council was to be granted leave to reframe its case and join the additional defendants: at [13]. There was no prejudice to the Minister in re-opening proceedings: at [8]. The Minister's refusal to release the Report and the Comments was an important element of the Council's original claim and the sudden public release of these documents on 12 May 2016 significantly adversely affected the Council's existing case: at [11]. The proposed relief sought against the additional defendants was intimately connected with the existing proceedings (at [10]) and their joinder enabled all relevant relief to be granted: at [9];

(2) The Delegate did not err in concluding in the Report that there had not been "a proper campaign of communication and advocacy both in favour and opposition of the proposal": at [81] and [87]. The Council accepted that it had conducted a campaign against the amalgamation (at [87]) and the evidence demonstrated that the Delegate's conclusion was manifestly correct: at [91]. Even if, contrary to the tendered evidence, the premise of the Council was correct - that the only material available to the Delegate concerning the Council's campaign against amalgamation was a "flyer" - the Delegate did not err in his conclusion (at [96]) because the flyer did not provide a balanced view of the cases for and against the proposed amalgamation: at [98];

(3) The Delegate did not err by advising the Minister to balance the weight given to the public opposition to the amalgamation against other considerations, including the unbalanced nature of the Council's campaign against the proposed amalgamation: at [100]. Similarly, the Delegate did not breach any obligation of procedural fairness by not notifying the Council of his decision to diminish the weight of Council's submission regarding the proposed amalgamation against other publically accessible material known to, or received by, his inquiry: at [108]. The evidence did not establish that the Delegate had not read or considered the Council's submission, including the content of the flyer: at [109]. There was nothing about the Delegate's recommendation in the Report relating to boundary

realignments and Sydney Airport that required the Delegate to notify the Council of his recommendation in order to discharge any procedural fairness obligation: at [119];

(4) The Commission did not misconstrue its statutory powers under the Act in reviewing and commenting upon the Report: at [134]-[135]. The statutory power did not contain any mandatory requirement for the content of any comments made by the Commission: at [138]. The Commission did not err in making a professional judgment as to what aspects of the Report to comment upon (at [139]), including its indication that the Delegate's recommendation relating to Sydney Airport and boundary adjustments was a matter for the Minister: at [141];

(5) The Commission did not breach any procedural fairness obligation to the Council: at [142]-[143];

(6) The Minister was not under any obligation to have regard to the delegate's report and the Commission's comments on the Council's Proposal prior to considering his own Proposal: at [163]. First, the wording of s 218F of the Act did not support the interdependency of statutory processes engaged to deal with separate proposals: at [164]. Secondly, the Council's Proposal would continue and be completed in accordance with the Act even if the Council ceased to exist: at [165]. Thirdly, such an interpretation of the Act could potentially indefinitely prevent the Minister from making any decision on an amalgamation proposal: at [166]. Fourthly, the Council's Proposal was not a mandatory relevant consideration for the Delegate in examining and reporting on the Minister's Proposal: at [167]; and

(7) The requirements of procedural fairness did not oblige the Minister to afford the Council a longer period of time than 7 days to make further submissions after receiving the Report and the Comments: at [178]. The purported inadequacy of this time period was unsubstantiated: at [178].

Macquarie International Health Clinic Pty Ltd v Sydney Local Health District; Sydney Local Health District v Macquarie Health Corporation Ltd; Macquarie International Health Clinic Pty Ltd v City of Sydney Council (No 9) [2016] NSWSC 155 (Kunc J)

(related decision: *Macquarie International health Clinic Pty ltd v Sydney Local health District; Sydney Local Health District v Macquarie Health Corporation Ltd (No 7)* [2015] NSWSC 1733 (Kunc J))

Facts: On 19 June 1997, Macquarie International Health Clinic Pty Ltd ("Macquarie") obtained, through an agent, development consent (the "Consent") to demolish two buildings and erect a 7-9 storey private hospital and a medical centre, including ancillary facilities and a New Hospital Road (in association with an adjoining commercial car park, approved by the Land and Environment Court on the same day), on land at Camperdown (the "Land"). Between February 1998 and November 2000, Macquarie caused various works on the Land to be carried out (the "Works") including: the demolition and removal of two buildings, bulk excavation works, remediation works, utilities infrastructure works and works relating to the construction of New Hospital Road. This proceeding was related to long running proceedings between Sydney Local Health District (the "District") and Macquarie concerning the construction of the hospital the subject of the Consent and the associated car park.

Issues:

(1) Whether or not the Consent had lapsed under s 95 of the *Environmental Planning and Assessment Act 1979* (the "Act").

Held: Declaration made that the Consent had not lapsed:

(1) The Works had "physically commenced" within the meaning of and period specified by s 95(4) of the Act on the Land to which the Consent applied: at [68];

(2) The evidence demonstrated that the six necessary elements of s 95(4) to prevent the Consent from lapsing had been satisfied: at [69]-[87]. The Consent was for both "the erection of a building" and "the carrying out of a work", the Works constituted "building, engineering or construction work" that had "physically commenced" on the Land prior to the date on which the Consent would have otherwise lapsed and the Works were sufficiently related to the Consent: at [69]-[87];

(3) The Works were not insufficient or a sham such that they did not engage s 95(4) of the Act: at [89]. This contention erroneously relied upon jurisprudence concerning the former statutory test of substantial commencement, rather than engaging with the operative test of physical commencement: at [92]-[96]; and

(4) The approach of the District in interpreting s 95(4) and the Consent by dissecting the various activities authorised by the Consent, so as to identify the focus or core activity, was inconsistent with a proper interpretation of the Act. The Act required that the development that was the subject of the Consent to be treated as an undifferentiated whole: at [97]-[98];

Ralph Lauren 57 v Byron Shire Council [2016] NSWSC 169 (Hidden J)

Facts: Between the 1960's and 1970's, Byron Shire Council (the "First Defendant") constructed an artificial headland protected by a rock seawall (the "Structure") nearby Belongil Beach. Fourteen owners of properties (the "Plaintiffs") on Belongil Beach commenced proceedings in 2010, alleging that the Structure had caused beach erosion at Belongil Beach and, consequently, exposed the Plaintiffs' properties to seawater and wave action. The Plaintiffs alleged that the First Defendant was negligent in its failure to take reasonable steps to protect their properties and in failing to allow the Plaintiffs to do so. In this proceeding, the Plaintiffs sought to file a further amended statement of claim, whilst the Defendants sought to strike out parts of the existing statement of claim. These motions both related to recent actions of the First Defendant, such as its adoption of the policy of "planned retreat" in a particular Development Control Plan.

Issues:

(1) Whether certain paragraphs of the existing statement of claim pleaded material facts and circumstances relating to the First Defendant's alleged breach of a duty to take reasonable steps to protect the Plaintiffs' properties from the dangers of the Structure; and

(2) Whether the proposed amendments to the existing statement of claim pleaded material facts and circumstances relevant to the alleged duty owed by the First Defendant and the alleged damages suffered by the Plaintiffs.

Held: Plaintiffs granted leave to file amended statement of claim; Defendants' motion to strike out parts of the existing statement of claim dismissed:

(1) The paragraphs sought to be struck out by the Defendants raised matters properly pleaded in a case concerning an alleged continuing duty of care, continuing breaches of that duty and resulting damages: at [56]. As the impugned pleadings raised issues properly to be tried, it was inappropriate to dispose of the pleadings by striking them out: at [56]; and

(2) Similarly, the proposed amendments to the statement of claim raised matters properly pleaded and it was, therefore, inappropriate to refuse the amendments: at [56].

Land and Environment Court of NSW

- Judicial Review

Bankstown City Council v Ramahi [2016] NSWLEC 34 (Craig J)

(related decisions: *Bankstown City Council v Ramahi* [2015] NSWLEC 74 Preston CJ)

Facts: Bankstown City Council ("the Council") commenced proceedings both by way of judicial review of complying development certificates and civil enforcement. The complying development certificates were sought to authorise the First Respondent to extend the First Respondent's existing dwelling and erect a secondary dwelling on her land. The certificates purported to be given under the provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (NSW) ("ARH SEPP"). Subsequently building work was completed and two interim occupation certificates were issued by the Second Respondent. The Council sought both a declaration that the complying development certificates and interim occupation certificates were invalid, having been given in breach of ss 76A and 85A of the *Environmental Planning and Assessment Act 1979 (NSW)* ("EPA Act") and also remedial orders to address the alleged breach.

Issues:

(1) Whether the complying development certificates issued by the Second Respondent for the erection of the secondary dwelling were valid;

(2) Whether a certifier could reasonably have held the opinion that the development proposed was complying development, correctly construing the provisions of the relevant planning instruments that specified what constituted complying development;

(3) Whether the complying development certificates were capable of founding the exercise of power to issue the interim occupation certificates; and

(4) The liability of a landowner who has participated in conduct giving rise to the breach or taken advantage of the breach to remedial orders.

Held: The certifier misunderstood the statutory obligation imposed upon him with the consequence that the complying development certificates and the interim occupation certificates were not validly issued:

(1) The complying development certificates did not meet the requirements for the issue of a valid complying development certificate. Compliance with development standards was necessary to qualify the development proposed as complying development. As a consequence, each of the complying development certificates was issued in breach of the EPA Act: at [134-137];

(2) Where satisfaction as to a particular matter or state of affairs is a prerequisite to the exercise of power, the legislation conferring power is taken to be referring to a state of satisfaction that can be formed by a reasonable person or body who, when exercising that power, correctly understands the meaning of the law by which the power is conferred. If the decision is one reached by misconstruing the legislation conferring power, the decision will be invalid: at [147];

(3) The determination to grant each complying development certificate was unreasonable: at [154-179];

(4) It was not open to the Second Respondent reasonably to conclude that the complying development certificates were sufficient to enliven his power to issue an interim occupation certificate as the precondition for the issue of an interim occupation certificate imposed by cl 154(1B) of the Environmental Planning and Assessment Regulation 2000 was not satisfied: at [214]; and

(5) By her conduct, the First Respondent has participated in and taken advantage of the building work carried out on her property. By reasons of both participation and advantage, the First Respondent has carried out development in breach of s 76A (1) of the EPA Act: at [235].

Botany Bay City Council v Minister for Local Government [2016] NSWLEC 35 (Pain J)

(related decision *Botany Bay City Council v Minister for Local Government* [2016] NSWCA 74 (Bathurst CJ, Beazley P, Ward JA))

Facts: Botany Bay City Council (the Council) was the subject of an amalgamation proposal (the Minister's proposal) initiated by the Minister for Local Government (the Minister) to merge with Rockdale City Council. The process for assessing and determining proposals for amalgamation is contained in the *Local Government Act 1993* (NSW) (LG Act). As well as the Minister, a council affected by the proposal or an appropriate minimum number of electors may make a proposal for amalgamation pursuant to s 218E of the LG Act. The Council prepared such a proposal which was sent to the Minister on 11 March 2016, after the close of the period of acceptance of submissions on the Minister's proposal. The Council commenced judicial review proceedings challenging the process followed by the Third Respondent the Departmental Chief Executive and the Fourth Respondent the Departmental Chief Executive's delegate in examining and reporting on the Minister's proposal. The Council's primary complaint was its own alternative proposal was not to be considered formally in that process. The Council sought orders and declarations to require the Third Respondent by his delegate the Fourth Respondent to have access to and consider the Council's proposal when considering the Minister's proposal. The Council also sought orders prohibiting the Second Respondent the Local Government Boundaries Commission from reviewing and or commenting on any report received from the Fourth Respondent concerning the Minister's proposal unless the Council's proposal had been first considered by the Fourth Respondent. Orders were also sought to prohibit the Minister from considering and or recommending to the Governor the Minister's proposal or any modified version of it unless the Council's proposal had first been considered by the Fourth Respondent. The Council also sought interim orders to prevent the

Respondents from taking any further step in considering the Minister's proposal until the final determination of the proceedings.

Issues:

(1) Whether the Fourth Respondent had the power to consider the Council's proposal;

(2) Whether the Council was denied procedural fairness;

(3) Whether the Council's proposal was required to be considered alongside the Minister's proposal;

(4) Whether the Minister could recommend a new proposal to the Governor; and

(5) Whether the Council's proposal was a mandatory relevant consideration for the Fourth Respondent in considering the Minister's proposal.

Held: Application dismissed, no breach of LG Act established, costs reserved:

(1) The Fourth Respondent was not authorised to consider the Council's proposal, as the instrument of delegation only referred to the Minister's proposal: at [23];

(2) There was no denial of procedural fairness to the Council in the process adopted by the Fourth Respondent in relation to the Minister's proposal: at [37]. The LG Act does not specify timeframes for the mandatory processes in ss 218F and 263: at [38]. The Council's fear of dissolution before the consideration of its proposal was not relevant: at [40];

(3) There was no requirement for the Council's proposal to be considered at the same time as the Minister's proposal: at [32]. Section 263 of the LG Act did not support as a discretionary matter, let alone as a mandatory matter, the Council's proposal being inserted into the process considering the Minister's proposal as the summons sought to do: at [32]. The Council's proposal had been referred by the Minister to the Third Respondent as part of a separate process: at [34];

(4) The Minister cannot recommend a proposal to the Governor if of the opinion that the modifications to the proposal arising out of the processes in the LG Act result in a new proposal: at [31]. The words "may not" in s 218F(7) operate to limit the powers of the Minister: at [28]. A new proposal must be considered separately as required in the mandatory processes specified in s 218F(2) of the LG Act. It is beyond the Minister's power to consider modifying his proposal to that proposed by the Council as the Council's proposal is agreed by all parties to be new: at [31]; and

(5) The Council's proposal is not a mandatory relevant consideration for the Fourth Respondent: at [33]. *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 is not authority that any submission about the Council's boundaries is a mandatory relevant consideration in this statutory context: at [33].

Dougherty Bros Pty Ltd v Outline Planning Consultants Pty Ltd [2016] NSWLEC 72 (Pain J)

Facts: The Applicants challenged the determination of the Joint Regional Planning Panel (Northern) ("JRPP") to grant development consent to Yamba Residential Subdivision Pty Ltd the Second Respondent for a 161 lot subdivision in the West Yamba Urban Release Area ("WYURA"). The Applicants are owners of a substantial area of land also within the WYURA. The five grounds of appeal maintained at the hearing asserted numerous failures to comply with the *Environmental Planning and Assessment Act 1979* (NSW) in determining to grant development consent to the Second Respondent, particularly in relation to flooding.

Issues:

(1) Whether the JRPP failed to consider cl 7.3(3) of the Clarence Valley Local Environmental Plan 2011 ("LEP") (Ground 1);

(2) Whether condition 37 of the consent impermissibly deferred flooding and flood impacts of the proposed development (Ground 2);

(3) Whether the JRPP failed to consider relevant parts of the Part X Urban Release Area Controls of the Residential Development Control Plan ("RDCP") (Ground 4);

(4) Whether the JRPP failed to consider the likely environmental impacts of the development in not considering the cumulative impact on and in relation to flooding, overland flows and drainage of the entire WYURA (Ground 5);

(5) Whether the decision to grant consent was legally unreasonable in that it failed to have regard to the implications of the development for the remainder of the WYURA and the development of the WYURA as a whole (Ground 6).

Held: Amended summons dismissed, the Applicants ordered to pay the Second Respondent's costs;

(1) Ground 1 not proven. Cl 7.3(3) of the LEP required the JRPP to form five prerequisite states of satisfaction before development consent could be granted: at [44]. The Applicants' onus of proving the JRPP's failure to form states of satisfaction of relevant matters in cl 7.3(3) cannot be met by relying on the lack of specific reference to cl 7.3(3) in the JRPP's Notice of Determination: at [48]. The Applicants did not discharge their onus of proof on the basis of the documentary evidence: at [46].

(2) Ground 2 not proven. A condition will only be invalid for lack of certainty or finality if it falls outside the class of conditions which the statute expressly or impliedly permits: at [115].The Applicants did not establish that was the case: at [115]. It was not apparent that the requirement of condition 37 that the development must comply with the RDCP Part D and Part X would result in a significantly altered development. There were other constraints identified in Condition 37 itself and numerous other conditions and requirements imposed by the consent designed to ameliorate any off-site flood impacts inter alia: at [115].

(3) Ground 4 not proven. The Applicants identified certain aspects of the consent and the conditions in an attempt to show that the JRPP did not give significant weight to the provisions of Part X: at [126]. The principle in *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 cannot be appropriated by a party to disguise a merits submission: at [127]. As with the other grounds, the Applicants' submissions failed to consider the JRPP's consideration of Part X in the context of the consent approval process as a whole: at [131]. The Applicants examined the text of Part X in detail in order to identify elements that they submitted were not directly referred to by the JRPP and therefore inferred that the JRPP failed to consider those parts of Part X. That is not an acceptable approach in judicial review proceedings: at [131]. The Applicants did not discharge the onus of proof to establish that the JRPP did not take into consideration Part X of the RDCP as required: at [134].

(4) Ground 5 not proven. The Applicants' submissions in essence identified merit considerations only, taking an impermissible shopping list approach of identifying matters which in the opinion of the Applicants were mandatory relevant considerations without establishing why they were: at [140]. The Applicants did not discharge the onus of proof of establishing ground 5: at [144].

(5) Ground 6 not proven. The high hurdle of satisfaction of legal unreasonableness could not be satisfied: at [146].

Friends of Tumblebee Incorporated V ATB Morgan Pty Ltd (No 2) [2016] NSWLEC 16 (Pepper J)

(related decisions: *Friends of Tumblebee Incorporated v ATB Morton Pty Limited* [2014] NSWLEC 127 Pepper J)

Facts: ATB Morgan Pty Ltd ("ATB Morgan") lodged a development application for a steel fabrication workshop and distribution facility in Weston, NSW, with Cessnock City Council ("the council") on 19 November 2012. The site the subject of the development application ("the site") had an area of 3.2 ha, and was located within the Hunter Economic Zone ("HEZ"), having a total area of 3,293 ha. On 23 October 2013 the council, by a majority of 8 to 2 votes, granted consent to the development application ("the consent"). The councillors gave reasons for granting the consent on 24 and 26 February 2014.

Subsequently, Friends of Tumblebee Incorporated ("Tumblebee") challenged the validity of the consent, arguing that as the development application was likely to significantly affect a threatened species, being the Regent Honeyeater, and that pursuant to s 78A(8)(b) of the Environmental Planning and Assessment Act 1979 ("EPAA") a species impact statement ("SIS") was required and none had been prepared.

The Regent Honeyeater is listed as a critically endangered species, there being only 350-400 of the birds left in the wild. ATB Morgan argued that as the site only constituted potential habitat for the Regent Honeyeater, and only constituted approximately 0.1% of the total HEZ area, the development was not likely to significantly affect the bird.

Section 5A of the EPAA sets out seven mandatory factors which a decision maker must take into account when deciding whether a development application will have a significant effect on a threatened species. Tumblebee submitted that the development application would have an adverse effect on the life cycle of the Regent Honeyeater such that a viable population would be placed at risk of extinction (s 5A(2)(a)), that the site was important habitat which would affect the long term survival of the Regent Honeyeater (s 5A(2)(d)), and that the development would increase the impact of key threatening processes, being the clearing of native vegetation and the colonisation of the site by aggressive Noisy Miners (s 5A(2)(g)). Further, in making this determination, pursuant to s 94A of the EPAA, the Threatened Species Assessment Guidelines ("TSA Guidelines") were required to be taken into account.

Issue:

(1) Whether the development was likely to significantly affect the Regent Honeyeater, and therefore, the development application was required to be accompanied by a SIS.

Held: Declaring the consent to be invalid:

(1) Whether the development is likely to significantly affect the Regent Honeyeater, and thus whether a SIS is required, is a jurisdictional fact which the Court must decide for itself: at [75];

(2) In addition to the seven mandatory factors a decision maker must take into account pursuant to s 5A(2) of the EPAA, other relevant matters to consider include the cumulative impacts of the proposed development, and the application of the precautionary principle: at [83], [181]-[185];

(3) As the Court was engaged in the task of determining a jurisdictional fact, the Court was not required to give weight to the reasons of the councillors who voted in favour of the development application: at [118];

(4) Applying a strict quantitative approach to determining the significance of a proposed development was not necessarily appropriate in this case: at [163]. Whilst the percentage of potential Regent Honeyeater habitat proposed to be cleared was small, because the HEZ had been found to support a significant breeding population of Regent Honeyeaters, any proposal to remove habitat, or even potential habitat, would reduce the likelihood of a successful breeding event in the future, which could be catastrophic given the bird's limited population: at [140], [165];

(5) The development was likely to significantly affect the Regent Honeyeater because:

   (a) the site was habitat, and not merely potential habitat, for the bird: at [137]-[141] and [193]-[196];

   (b) the site was likely to host the bird on occasions given that the site had a similar vegetation composition to contiguous areas in the HEZ where the bird had been observed, and the TSA Guidelines stated both occupied and unoccupied habitat was to be considered: at [158] and [194];

   (c) the HEZ had been found to support a significant breeding population of the bird: at [140];

   (d) the development constituted the clearing of native vegetation which had been identified as a key threatening process to the Regent Honeyeater: at [207];

   (e) the cumulative impact of development was significant because in addition to the 3.2 ha to be cleared by the proposed development, an additional 135.2 ha within the HEZ had been approved for clearing: at [165]-[180] and [214]-[220]; and

   (f) the development would potentially create an additional area of 50 ha that could be colonised by Noisy Miners, a species known to aggressively exclude Regent Honeyeaters from habitat and which was also identified as a key threatening process to the Regent Honeyeater: at [120]-[128]; and

(6) Ameliorative measures contained in the development consent are not a part of the development application, and therefore, cannot be considered in an assessment of the impacts of the development: at [221]-[225]

Hornsby Shire Council v Trives (No 4) [2016] NSWLEC 28 (Craig J)

(related decisions: *Trives v Hornsby Shire Council* [2015] NSWCA 158; 89 NSWLR 268 Basten, Macfarlan and Meagher JJA, *Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190 Biscoe J and *Hornsby Shire Council v Trives* [2014] NSWLEC 171 Craig J)

Facts: Hornsby Shire Council ("the Council") sought judicial review of the decisions by the First Respondent (Mr Trives), an accredited certifier, to issue complying development certificates for a new structure to be erected on each of three different residential properties. The properties were owned by the respective Second and Third Respondents joined in each proceeding. In *Hornsby Shire Council v Trives* [2014] NSWLEC 171 the Court determined a separate question as to whether each of the impugned complying development certificates issued by the First Respondent was valid. That question was determined by Craig J in the negative. The First Respondent appealed to the Court of Appeal on the sole ground that the determination of the question was not one of objective jurisdictional fact, notwithstanding that in the argument before Craig J, it was accepted by the First Respondent that the question was to be so determined. The Court of Appeal upheld the appeal on this ground and remitted the matter for determination by this Court *Trives v Hornsby Shire Council* [2015] NSWCA 158; 89 NSWLR 268). On remitter to this Court, Biscoe J determined that each of the complying development certificates was invalid (*Hornsby Shire Council v Trives (No 3)* [2015] NSWLEC 190). As a consequence the Council sought orders in each proceeding declaring the relevant complying development certificates to be invalid. None of the Respondents opposed the making of such an order. Further, the Council sought mandatory orders for the demolition of works constructed pursuant to the complying development certificates. In addition, the Council sought an order that the First Respondent pay its costs of proceedings. The Second and Third Respondents in each proceeding also sought an order for costs against the First Respondent.

Issues:

(1) Determination of the orders that should be made for final disposition of each proceeding:

  (a) whether it is appropriate to made declaratory orders with respect to the invalidity of each complying development certificate issued by the First Respondent; and

  (b) whether it is appropriate to order the demolition of structures erected on two of the premises.

(2) Costs orders:

  (a) whether it is appropriate to award costs against the First Respondent for costs attributable to the determination of the separate question and the costs of the proceedings generally; and

  (b) whether the position of the Second and Third Respondents can correctly be equated to that of a submitting respondent whose joinder has only been made necessary because of the unlawful action of another party.

Held: Declaratory and remedial orders made; First Respondent to pay costs of Applicant in all three proceedings and those of the Second and Third Respondents in two of the proceedings attributable to the determination of the separate question and the costs of the proceedings generally.

(1) Given that the challenge to the validity of each of the certificates issued by the First Respondent had been successful, declaratory orders reflecting the Court's determination were appropriate: at [10];

(2) It was appropriate that an order for demolition of structures erected pursuant to the invalid certificates, particularly as those structures constituted prohibited development. Such an order gives effect to the intent of the *Environmental Planning and Assessment Act 1979* (NSW) ("the Act") that "the orderly development and use of the environment" should be controlled by adherence to the provisions of the Act and planning instruments made under it: at [14];

(3) With respect to costs sought by the Council, the Court of Appeal held that the costs of the first hearing before this Court "should depend on the final outcome of the Council's application, which is to be remitted". As the Council has been successful in this Court in obtaining orders that it sought the usual course is that costs should follow that event pursuant to r 42.1 of the Uniform Civil Procedure Rules 2005. In those circumstances, the proper exercise of discretion was that the First Respondent should be ordered to pay the Council's costs of the proceedings, including the costs of the separate question in this Court: at [18-19];

(4) In each proceeding the Second and Third Respondents proceeded as if on a submitting appearance basis. The costs incurred by the Second and Third Respondents were minimal and their actions in taking a "benign position" in the proceedings, indicates that they had acted reasonably: at [22]; and

(5) The Second and Third Respondents were not responsible for the Council incurring costs of any significance in these proceedings. They were necessary parties to the proceedings as the orders sought by the Council directly impacted upon them as property owners and developers but responsibility for their joinder rested with the First Respondent: at [22-23].

Marshall Rural Pty Limited v Hawkesbury City Council (No 2) [2015] NSWLEC 10 (Moore J)

(related decisions: *Marshall Rural Pty Limited v Hawkesbury City Council and Ors* [2015] NSWLEC 197 (Moore J))

Facts: Development consents granted to Basscave Pty Ltd for the temporary use of two barns, the Polo Barn and the Sunnybrook Barn, each for the temporary use as a "function centre", were invalidly given by Hawkesbury City Council. The orders (at [267] of the earlier judgment) detailing the operative dates of the restraint of use were left blank to provide the parties time to make submissions on the applicability of s 124(1) of the *Environmental Planning and Assessment Act* 1979, a section that grants the Court power to make such orders as it thinks fit, to remedy or restrain a breach of the Act, if in the circumstances it is appropriate to do so.

Evidence as to the nature of ameliorative measures implemented at the facilities that purportedly dealt with noise impacts (an issue in the initial proceedings) and that fresh development applications had been lodged with the Council.

Counsel for Basscave indicated that ameliorative measures discussed would be the subject of an undertaking that would extend to protecting nearby residences from acoustic impacts. His Honour also raised an issue of "unjustified enrichment" of Basscave if they were permitted to continue to conduct functions until the Council had determined the fresh development applications. A charitable donation OF $3,500 to the African Aids Foundation was to be made to deal with this concern.

Issues:

(1) Whether the ameliorative measures proposed to deal with noise impacts were sufficient; and

(2) Whether the amount of $3,500 constituted adequate public interest compensation for permitting the ongoing use of the facilities pending the Council's review if the further development applications.

Held:

(1) On the evidence submitted on behalf of the Second and Third Respondent, his Honour was satisfied that if the ameliorative process postulated was implemented and coupled with the undertaking provided, the likelihood of noise impacts on any nearby residence would be a de minimis one: at [17];

(2) The amount of $3,500 was sufficient in dealing with the public interest compensation. It was as much a symbolic undertaking as a practical benefit to the children affected in Africa, as in some respects the act amounted to a mea culpa on behalf of the Second and Third Respondents: at [20]; and therefore

(3) The prohibitory orders relating to the temporary use of each the Polo Barn and the Sunnybrook barn as a "function centre" were suspended until 27 March 2016: at [21].

Mosman Municipal Council v IPM Pty Ltd [2016] NSWLEC 26 (Pepper J)

Facts: In February 2012, Mosman Municipal Council ("council") granted development consent to IPM Pty Ltd ("IPM") to demolish above-ground structures, retain existing basement car parking and construct a five story mixed use shop multiple dwelling building. The consent provided that 40 car parking spaces were to be devoted to both retail and public uses and were to be managed by the council ("car parking consent condition"). In March 2013, the consent was modified. Subsequently, IPM submitted a development application to further modify the consent to reconfigure the layout of the ground floor, from three retail tenancies to two retail tenancies ("the development"). This application was refused, a decision confirmed on appeal (*IPM Pty Ltd v Mosman Municipal Council* [2014] NSWLEC 1141). Subsequently, in

March 2014, IPM sought and was granted a complying development certificate ("CDC") for the development. As required by cl 5.25 of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 ("Codes SEPP") the CDC contained the mandatory conditions contained in Sch 8 of the Codes SEPP. Relevantly, condition 24(2)(b) required that the car parking spaces only be used by vehicles associated with the premises ("CDC condition").

Issues:

(1) Whether s 101 of the Environmental Planning and Assessment Act 1979 ("EPAA") operated to time bar the proceedings;

(2) Whether the public notice was given in accordance with cl 137(1) of the Environmental Planning and Assessment Regulation 2000 ("EPAR");

(3) Whether the time limit imposed by s 101 of the EPAA impermissibly restricted the jurisdiction of the Court to review a decision for jurisdictional error contrary to *Kirk v Industrial Court of New South Wales* [2010] HCA 1 ("Kirk");

(4) Whether r 59.10 of the Uniform Civil Procedure Rules 2005 ("UCPR") further operated to time bar the proceedings;

(5) Whether the certifier had failed to have regard to the consent granted by Council; and

(6) Whether an irreconcilable conflict between the car parking consent condition and the CDC condition arose, meaning that the certifier had fallen into jurisdiction error in issuing the CDC.

Held: Dismissing the appeal with costs:

(1) Section 101 of the EPAA did not operate to time bar the proceedings because the public notice was not given in accordance with cl 137(1) of the EPAR: at [61];

(2) Clause 137(1) of the EPAR relevantly requires a public notice to state that the determination of the application for a CDC was available "during ordinary office hours at the council's offices". Applying the obiter dicta of Basten JA in *Hoxton Park Residents Action Group v Liverpool City Council* [2011] NSWCA 349, which was held to be highly persuasive given an identically worded clause was considered in that case, the public notice was defective because it failed to identify what the council's office hours were and what the council's address was: at [60];

(3) Even if the public notice had been given in accordance with the EPAR, the time limit imposed by s 101 did not protect the decision from review for jurisdictional error, applying *Brown v Randwick City Council* [2011] NSWLEC 172 ("Brown") (at [37]-[39]): at [63]. Whilst obiter dicta in *Trives v Hornsby Shire Council* [2015] NSWCA 158 (at [46]-[50]) suggested that Kirk may not apply and that a reasonable limitation period may permissibly exclude judicial review upon expiration, as a matter of comity Brown would have been followed: at [70];

(4) The three month time limit contained in cl 59.10 of the UCPR operated because, pursuant to r 59.10(4) of the UCPR, where another time limit is not operative the UCPR time limit will operate: at [73].

(5) It was appropriate to grant an extension of time given: the council's statutory responsibility to ensure that development conforms to relevant development standards; the public interest, which in this case outweighed the need for certainty and finality of a decision to issue a CDC; that minimal prejudice was suffered by IPM; that the two month delay was not overly long; and, given that the delay was not deliberate: at [76]-[88];

(6) The certifier had not failed to have regard to the development consent: at [111]. Given the wholly unique importance of the consent to the deliberative task of the certifier, a court would only infer that it had been overlooked after anxious deliberation: at [96]. On the evidence, the certifier had considered the consent: [98]-[102] and [109]-[110];

(7) The signature of a certifier on a CDC rises no higher than a representation, that in the opinion of the certifier, the proposed development is complying development. This is different to a signature on a contract: at [105]; and

(8) If there had been an irreconcilable conflict between the two provisions, the certifier would not have had the jurisdiction to issue the CDC because, pursuant to cl 5.6(1)(b) of the Codes SEPP, a CDC cannot be issued if it would "cause the contravention of any existing condition of the most recent

development consent". However, there was not an irreconcilable conflict between the car parking consent condition and the CDC condition because the CDC condition did not apply: at [7] and [134]. Because the conditions contained in Sch 8 of the Codes SEPP must be incorporated into every CDC, even where particular conditions are clearly inapplicable to a specific development, it is appropriate that in certain circumstances they be read so as not to apply to the development in question: at [120], [125]-[126].

- Compulsory Acquisition

Bligh Consulting Pty Ltd v Ausgrid [2016] NSWLEC 75 (Pain J)

Facts: Ausgrid compulsorily acquired three interests in land at 31 Bligh Street Sydney owned by Bligh Consulting Pty Ltd ("Bligh"), being an easement for crane swing, an easement for scaffolding and an easement for rock anchors. The easements were acquired to facilitate demolition and excavation and construction of an electrical substation on neighbouring land at 33 Bligh Street Sydney. On 31 Bligh Street stands a heritage-listed building that was leased to the Lowy Institute for International Policy ("the Institute") until December 2015. Bligh claimed compensation pursuant to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("JT Act") under s 55(a) market value, (d) disturbance and (f) decrease in value of adjoining land by reason of the carrying out of the public purpose for which the land was acquired. Bligh's case for compensation was founded on its contention that the Institute vacated the building at 31 Bligh Street by reason of the carrying out of or the proposal to carry out the public purpose and therefore the value of the land decreased. The date of acquisition was 8 August 2014, and on 30 September 2014 the Institute's lease ended and a new lease was not entered into. The Institute remained in the building on a month to month basis until 11 December 2015.

Issues:

(1) What was the public purpose of the acquisitions;

(2) What was the appropriate valuation method;

(3) To what extent can events after the date of acquisition be considered in determining a claim for injurious affection;

(4) Whether a hypothetical purchaser and vendor acting with appropriate foresight at the date of acquisition would consider that the Institute (or a tenant with its characteristics on Ausgrid's case) acting reasonably and prudently would vacate 31 Bligh Street;

(5) Whether s 62 of the JT Act applies to rock anchor easements; and

(6) What was the market value of the easements.

Held: Total compensation payable to Bligh $682,000, costs reserved:

(1) The public purpose of the acquisitions was found to be the demolition, excavation and construction work required to build the substation at 33 Bligh Street: at [40]. It was contended for by Ausgrid that the public purpose of the acquisitions was the purpose of the easements themselves, being for a crane swing, for the rock anchors and for the scaffolding: at [32]. The specific terms of the easements contained in the acquisition notices are not the sole determinant of the nature of the public purpose: at [37]. Ausgrid obtains compulsory acquisition powers because of its functions and status under the Electricity Supply Act 1995 (NSW) and the Energy Services Corporations Act 1995 (NSW) and therefore Ausgrid would not be able to compulsorily acquire the three easements unless they were for a function under those acts: at [39]. Ausgrid's construction of the public purpose was too narrow and would result in an absurd result, being that at least seven different public purposes would exist in and around the 33 Bligh Street from the acquisition of easements from other adjoining owners as well as the substation development itself: at [40].

(2) The court employed the before and after method to assess the market value of the land before and after the date of acquisition to determine the adverse impact if any of the acquisitions. This involved the hypothetical sale of Bligh's interest in the land. The Institute as the tenant must be assumed to have no relationship with the landlord/owner: at [41]. Bligh characterised the Court's task as determining as a matter of fact what the Institute would have done acting reasonably and prudently in

the before and after scenarios: at [41]. Ausgrid submitted that the Institute's actions must be considered as if it were a reasonable arm's length lessee of a particular kind meaning with the characteristics of the Institute (rather than a general commercial tenant): at [41]. The Institute and Bligh are not arm's length parties [43]. Bligh must also be treated as a reasonable and prudent hypothetical vendor, and the same reasons why the Institute is not at arm's length applied to Bligh: at [50]. This situation made relating the arrangement to the hypothetical situation required in the valuation approach difficult: at [50].

(3) Both parties sought to rely to some degree on evidence of events that occurred after the date of acquisition, relying on *Roads and Maritime Services v Allandale Blue Metal Pty Ltd* [2016] NSWCA 7; (2006) 212 LGERA 307: at [46]. Justice Pain stated that Allandale does not expressly support an approach that events up to the hearing date can be considered: at [47]. Her Honour held that while assumptions about the before and after scenarios must be made, greater consistency of approach in the before and after is achieved if events up to the date of acquisition and afterwards only where justified by *Housing Commission (NSW) v Falconer* [1981] 1 NSWLR 547; (1981) 50 LGRA 334 (ie to prove a foresight but not to establish a hindsight) are considered: at [48].

(4) Held at [122] that the inquiries the hypothetical vendor and purchaser would make with the Institute at the date of acquisition would identify that the Institute did not propose to enter into a further lease and would continue on a hold over month to month tenancy for an unspecified period of time. Bligh continued to receive rent on a month to month basis at an above market rate from the Institute after the date of acquisition. Loss to Bligh from the premises being vacant would only arise if it established the inference on the balance of probabilities that at the date of acquisition the hypothetical parties engaged in a market transaction would consider the Institute was likely to move in the foreseeable future because of the public purpose: at [123]. The demolition and excavation work was not unreasonably noisy (meaning no more noisy that other similar work) and tenants do not generally vacate buildings in the CBD when demolition and construction occurs next door: at [135]. When the expert evidence and the relationship between the Institute and Bligh identified by Ausgrid were considered the inference arose that an arm's length tenant similar to the Institute acting reasonably would not necessarily leave the premises because of the public purpose of the acquisition: at [137].

(5) Section 62 of the JT Act applies to rock anchors: at [148]. The focus of s 62(1) is the subterranean nature of the acquisition. The purpose of the section is to disentitle a landholder to compensation when the easement or right acquired would have little to no impact on the landholder's rights on the surface: at [150].

(6) There was scarce information of a market to aid in the valuation of the easements by a comparative method: at [160]. Because of the application of s 62 of the JT Act to rock anchors, no compensation was payable to Bligh for that easement. For the scaffolding, determined that the total compensation should be $50,000, being $25,000 market value and $25,000 injurious affection for the minimal impact of that easement. $400,000 was determined as the market value compensation for the crane swing, based on the evidence of one of the valuers on the basis of a comparable transaction. Therefore the total compensation was $450,000 for the scaffolding and crane swing easements and the agreed figure of $232,000 for disturbance which amounted to a total of $682,000.

- Criminal

Canterbury City Council v Ahmed [2016] NSWLEC 68 (Craig J)

Facts: Auto Group Australia Pty Ltd (the "Second Defendant") was the proprietor of an automotive workshop business (the "Business") operating on land at Campsie (the "Land"). Mr Ali Ahmed (the "First Defendant") was the manager of the business and the lessee of the Land. On 19 October 2012, court orders (the "Orders") were made restraining the Defendants from carrying out motor vehicle repair and other automotive works outside of the permitted hours of operation specified in a development consent issued by Canterbury City Council (the "Prosecutor"). The Defendants were each charged with the offence of civil contempt in that, from 19 October 2012 to 13 December 2012, they contravened the Orders by using the Land for motor vehicle repair works outside of the permitted hours of operation. The Defendants pleaded not guilty.

Issues:

(1) Whether motor vehicle repair or other automotive works were carried out on the Land outside of the permitted operating hours;

(2) Whether the terms of the Orders were ambiguous such that that the requirements of the Orders were unclear;

(3) Whether the First Defendant personally carried out automotive works on the Land outside of the permitted operating hours or instructed employees of the Business to do so;

(4) Whether the First Defendant, as the manager of the Business, knew that automotive works were occurring on the Land outside of the permitted operating hours and allowed these works to continue; and

(5) Being a circumstantial case, whether there was any reasonable alternative explanation for the out-of-hours automotive works consistent with the innocence of the First Defendant.

Held: Defendants guilty as charged:

(1) The evidence established that automotive works were carried out on the Land outside of the permitted operating hours between 19 October 2012 to 13 December 2012: at [39] and [46];

(2) The people who carried out the works on the Land outside of the permitted operating hours did so with the authority of the Second Defendant: at [48];

(3) The relevant terms of the Orders were unambiguous: at [50];

(4) There was insufficient evidence to establish that the First Defendant personally carried out automotive works in breach of the Orders or instructed employees of the business to do so: at [54] and [56]; and

(5) The First Defendant, as the manager of the business, both knew that employees of the Business were carrying out automotive works on the Land outside of the permitted operating hours, in contravention of the Orders, and failed to prevent employees from so doing: at [60]. There was no reasonable alternative hypothesis consistent with the innocence of the First Defendant: at [61].

Environment Protection Authority v Borg Panels [2016] NSWLEC 71 (Pain J)

Facts: The Defendant pleaded guilty to one charge of polluting waters in breach of s 120 of the Protection of the Environment Operations Act 1997 (NSW). The Defendant operates a wood processing facility at Oberon. The offence occurred when a hose connected to a pump in an effluent storage dam was found to be frozen and placed by an employee in a position to defrost and from where it discharged effluent into a stormwater drainage channel and into a creek. It was agreed that the offence occasioned actual harm to the environment through degraded water quality and strong and offensive odours for not more than six days after the offence. It was also agreed that the offence occasioned likely environmental harm by causing an aquatic environment less able to support aquatic animals and exposing animals and plants to toxic and anaerobic water conditions. The offence also caused potential harm to the environment through exposing aquatic animals and plants to toxic water conditions sufficient to cause lethality in the first 24 hours after the commission of the offence.

Issues:

(1) What were the objective circumstances of the offence;

(2) What were the subjective circumstances of the Defendant; and

(3) What was the appropriate penalty.

Held: Defendant convicted and fined $58,500, Defendant ordered to pay the Prosecutor's costs and investigative costs:

(1) While the immediate cause of the offence was the carelessness of an employee the offence resulted from a lack of adequate procedures being in place which is the responsibility of the Defendant. This was found to increase the seriousness of the offence as the businesses should be proactive in ensuring that no polluting events occur as a result of oversight. The environmental harm caused was

significant for a short period in the immediate and wider local area. The offence was of low to moderate objective seriousness;

(2) The Defendant did not have any prior convictions, pleaded guilty at the earliest opportunity, cooperated with the investigation at all times, showed remorse for its actions and the offence was not deliberate. The Defendant was found to be of good corporate character and had taken steps to ensure that the circumstances giving rise to the offence could not occur again; and

(3) A fine of $90,000 was imposed, which was discounted by 35% to $58,500 to reflect the subjective circumstances including the early plea of guilty. A publication order was also made. The Defendant was ordered to pay the Prosecutor's professional costs of approximately $45,000 and its investigation costs of $27,780.12.

Environment Protection Authority v Sydney Drum Machinery Pty Ltd (No 4) [2016] NSWLEC 59 (Craig J)

Facts: Sydney Drum Machinery Pty Ltd (the "First Defendant") operated a chemical drum/container cleaning and repair business on land in St Marys (the "Land"). Mr Imad Osman-Kerim (the "Second Defendant") was the sole director of the First Defendant. The Environment Protection Authority (the "Prosecutor") initially charged each Defendant with three offences against the *Protection of the Environment Operations Act 1997* (the "Act"). The Prosecutor did not pursue the charges against the First Defendant. The charges against the Second Defendant were brought against him in his capacity as sole director and were founded upon the First Defendant's acts. The Second Defendant pleaded guilty to committing an offence against s 64(1) of the Act but pleaded not guilty to two offences against s 91(5) of the Act in failing to comply, without reasonable excuse, with clean-up notices issued by the Prosecutor under s 91 of the Act on 17 January 2012 (the "17 January Notice") and 24 January 2012 (the "24 January Notice").

Issues:

(1) Whether, at the time of issuing the 17 January Notice pursuant to the Act, the Prosecutor reasonably suspected that a pollution incident had occurred, acted reasonably and took into account all mandatory relevant considerations;

(2) Whether the clean-up action required by the 17 January Notice was causally related to the identified pollution event and the terms of the Notice sufficiently clear and reasonable;

(3) Whether the Second Defendant had a reasonable excuse for not complying with the 17 January Notice or the 24 January Notice; and

(4) Whether the 24 January Notice was invalid because the required clean-up action was unreasonable.

Held: Second Defendant guilty as charged:

(1) At the time of issuing the 17 January Notice, the relevant officers of the Prosecutor reasonably suspected that a pollution incident had occurred: at [228]. Confronted with a spill of liquid waste from an unidentified cause and inoperative machinery, the officers held a reasonable suspicion that escaped liquid waste was likely to cause water pollution: at [224]. Additionally, the officers did not act unreasonably by allegedly failing to consider six relevant matters: at [247]-[254]. These matters were not mandatory relevant considerations under s 91 of the Act: at [248];

(2) There was a sufficient nexus between the clean-up action required by the 17 January Notice and the pollution event (at [230]) and the Notice was clear in requiring, first, the immediate engagement of a plumber and, secondly, that the required works be completed by 5.00pm on 17 January 2012: at [235];

(3) The period allowed by the 17 January Notice for compliance with the required clean-up action was not unreasonably short: at [246];

(4) There was insufficient evidence to establish that the Defendants had any reasonable excuse for not complying with the 17 January Notice (at [263]) or the 24 January Notice: at [345]-[346]; and

(5) The clean-up action required by the 24 January Notice did not impose an unreasonable or unduly costly burden on the First Defendant: at [316]-[334]. The decision to require the clean-up action specified in the Notice was defensible: at [334].

Environment Protection Authority v Terrace Earthmoving Pty Ltd (No 3) [2016] NSWLEC 50 (Craig J)

(related decisions: *Environment Protection Authority v Terrace Earthmoving Pty Ltd* [2012] NSWLEC 216 (Craig J) and *Environment Protection Authority v Terrace Earthmoving Pty Ltd* [2013] NSWCCA 180 (Basten ACJ, Hall J and Barr AJ))

Facts: Terrace Earthmoving Pty Ltd (the "First Defendant") transported demolition/excavation material from various construction sites to a rural property (the "Property") and used this material to build an internal access road. The First Defendant was charged with committing two offences against s 143(1) of the *Protection of the Environment Operations Act 1997* (the "Act") by transporting waste to the Property when the Property could not lawfully be used as a waste facility for that waste. The sole director of the First Defendant, Mr Geoffrey Page (the "Second Defendant"), was also charged with two offences against s 143(1) by dint of s 169(1) of the Act. As a result of previous decisions in these proceedings, only three issues remained for determination.

Issues:

(1) Whether the materials transported to the Property were "unwanted" or "surplus" in the hands of the owner of those materials on the land from which they were taken and, therefore, constituted "waste" as defined in the Act;

(2) Whether the materials transported to the Property were processed prior to transportation in a manner that caused them to cease to be "waste" as defined by the Act; and

(3) Whether the Property could lawfully be used as a waste facility for the waste.

Held: Defendants guilty of all charges:

(1) In determining whether material was "unwanted" or "surplus" in the hands of the owner of those materials, the owner whose state of mind was to be considered was the person who had property in the material prior to the actions of the person who took possession for the purpose of removing the material from the site: at [64];

(2) The First Defendant was contracted to transport demolition material from construction sites: at [70]. This demonstrated that the materials were "surplus" or "unwanted" by the entity who contracted to have the material removed and, therefore, within the meaning of "waste" as defined in the Act: at [70] and [74]-[77]. The First Defendant was not the owner of the materials prior to transportation: at [78];

(3) The First Defendant did not process, re-use or recycle the demolition materials at the sites from which it was collected: at [81]. The materials were not "recovered" materials "produced" from waste and, therefore, did not cease to be "waste" due to the operation of paragraph (d) of the definition of "waste" in the dictionary to the Act: at [87]. The sorting and crushing of the materials by the First Defendant prior to transportation did not alter the character of those materials as "waste" for the purposes of the Act: at [91]-[92]; and

(4) Pursuant to s 48 and Sch 1 of the Act, a licence was required to render the use of the Property as a waste facility lawful: at [122]-[145]. No such licence was held: at [145]. Development consent granted under the Environmental Planning and Assessment Act 1979 was also required to render the use of the Property as a waste facility lawful: at [155]. No such development consent was granted: at [155].

Goo v Office of Environment & Heritage [2016] NSWLEC 27(Moore J)

Facts: Mr Jerry Goo (Applicant) was charged with three offences against s 101(1) of the *National Parks and Wildlife Act* 1974 (NPW Act) for the possession of approximately 60 Eastern Long-Necked Turtles and for the sale of four of those turtles. A number of animal cruelty charges were also laid against the Applicant by the RSPCA, however these charges were not the subject of the Land and Environment Court proceedings. The Local Court convicted the Applicant of all the charges and imposed a sentence, with respect to the offences against s 101(1) of the NPW Act, of 3 month imprisonment accompanied with a $14,000 costs order in favour of the OEH.

The 3 month term of imprisonment was appealed by the Applicant.

Issues:

(1) Whether the sentence was too severe.

Held: Upholding the appeal:

(1) In weighing up the aggravating, mitigating and other factors under s 21A of the CSP Act and evaluating the NPW Act considerations, particularly the extent of harm (s 194(1)(a)) and whether the offences were committed for commercial gain (s 194 (1)(h)), a total penalty of $12,600 was imposed in lieu of the 3 month full-time custodial sentence; and

(2) The prosecutor's costs of $14,000 were confirmed with no costs for the Land and Environment Court proceedings.

Hurstville City Council v Romanous Construction Pty Ltd; Hurstville City Council v Romanous Contractors Pty Ltd [2016] NSWLEC 24 (Pain J)

Facts: The two Defendants pleaded guilty to the offence of pollution of land under s 142A(1) of the *Protection of the Environment Operations Act 1997 (NSW)*. The offences concerned the same land and were broadly similar, involving the placement of fill containing elements of bonded asbestos obtained from other areas of the site.

Issues:

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

(2) What were the subjective circumstances of the Defendants;

(3) Whether an aggravating factor was present; and

(4) What was the appropriate penalty for each Defendant.

Held: Defendants convicted and fined $42,000 each, publication orders made, orders to pay the prosecutor's costs:

(1) The risk to human health and safety from the low levels of bonded asbestos was found to be low. Both Defendants took action after they became aware of the presence of asbestos to remediate the site. The objective seriousness of both offences was low given the low level of risk to human health and safety and that the offences did not result from deliberate behaviour;

(2) Both Defendants pleaded guilty however not at the earliest opportunity so were found to be entitled to a little less than a 25% discount. Neither Defendant had prior convictions for environmental offences and were found to be of good character and unlikely to re-offend;

(3) The prosecutor submitted that the offences were committed without regard for public safety, which is an aggravating feature under s 21A(2)(i) of the Crimes (Sentencing Procedure) Act 1999 (NSW). The admitted circumstances did not justify such a finding in relation to either Defendant; and

(4) Both Defendants were fined $60,000 which was reduced by 30% for the mitigating circumstances in both cases to $42,000. A publication order was also made against both Defendants. The Defendants agreed to pay the prosecutor's costs.

Water NSW v Faulkner [2016] NSWLEC 17 (Preston CJ)

Facts: Mr Faulkner (the "Defendant") was charged with committing four offences against the Sydney Water Catchment Management Regulation 2008 (the "SWCM Regulation 2008") and one offence against s 143 of the *Protection of the Environment Operations Act 1997* (the "POEO Act") by unlawfully transporting and depositing waste on land in a catchment area. The Defendant pleaded not guilty to each charge. It was accepted that the waste found in the catchment area included some waste collected by the Defendant from premises during his collection round for a waste collection company. The Defendant denied that he had deposited this waste in the catchment area. The Defendant also challenged the charges on the bases that the Court did not have jurisdiction to hear and determine the four charges under the SWCM Regulation 2008 and that Water NSW (the "Prosecutor") did not have authority to prosecute the charge under the POEO Act.

Issues:

(1) Whether the Court's jurisdiction to hear and determine the four charges brought against the Defendant under the SCWM Regulation 2008 was lost due to the repeal of the SWCM Regulation 2008 and its parent Act or by the consequential amendments to s 21(a1) of the Land and Environment Court Act 1979;

(2) Whether the Prosecutor had authority to prosecute the charge under the POEO Act;

(3) Whether the activity involved in the alleged commission of the offence was a scheduled or non-scheduled activity under the POEO Act;

(4) Being a circumstantial case, whether there was any reasonable alternative explanation for the existence of waste in the catchment area from the Defendant's waste collection truck inconsistent with the conclusion that the Defendant deposited the waste in the catchment area.

Held: Defendant acquitted of all charges:

(1) The Defendant's liability for offences committed under the repealed SWCM Regulation 2008 endured because of s 30(1) of the Interpretation Act 1987: at [12]. This section also preserved the Court's jurisdiction to hear and determine the four charges brought against the Defendant under the SCWM Regulation 2008: at [13];

(2) The Prosecutor had authority to prosecute for offences against the POEO Act in relation to relevant non-scheduled activities by dint of cl 4(1) of the Water NSW Regulation 2013: at [17]. The activity that constituted the offence charged was the transportation of waste to a place within the catchment area, rather than the deposition of waste at that place: at [23]. The transportation of waste to a place within the catchment area was a relevant non-scheduled activity under the POEO Act: at [23]. Therefore, the Prosecutor was empowered to prosecute the Defendant for the offence charged under s 143(1) of the POEO Act: at [24].

(3) The Prosecutor failed to establish that the only reasonable conclusion that could be drawn from the facts was that the Defendant deposited the waste on the land in the catchment area: at [28]. It was a reasonable alternative explanation that some waste fell out from the Defendant's waste collection truck on a road nearby the catchment area and was then moved by someone onto an existing pile of waste in the catchment area: at [89]-[90].

- Contempt

Cumberland Council v Khoury (No 3) [2016] NSWLEC 55 (Moore J)

Facts: Mr Khoury (Defendant) was the owner of a property in South Wentworthville and was charged by Cumberland Council with three counts of contempt for failing to comply with orders of the Court, dated February 2015 and April 2015, ordering him to cease use of his premises as a boarding house and to carry out a series of prescribed remedial works.

Issues:

(1) Whether the Defendant failed to cease use of his premises as a boarding house;

(2) Whether the Defendant carried out the remedial works as required;

(3) If the Defendant is in contempt, whether the contempt should be regarded as contumacious; and

(4) In light of evidence of a Construction Code expert which did not preclude the possibility of the premises being adapted to be used as a boarding house, whether the ongoing contempt could be remedied.

Held:

(1) The works required to be carried out pursuant to the April 2015 orders had not been carried out by the Defendant: at [41];

(2) The provisions of the definition of 'boarding house' were met and there being no application for consent by the Defendant as mandated by the land use table of the Holroyd Local Environmental

Plan 2013, the Defendant was guilty of failing to comply with the order to cease operation of his premises as a boarding house: at [91];

(3) That the Defendant was therefore guilty of the three charges of contempt: at [118];

(4) That the contempt should be regarded as contumacious, as there was a deliberate and ongoing intention to disregard the orders of the Court, the Defendant continued to use the premises as a boarding house for 12 months after the first of the two orders requiring cessation of use, the failure to complete the list of works as ordered was ongoing and the Defendant did not indicate a preparedness to purge his ongoing contempt by offering a timeframe within which he would complete the remedial works: at [120] to [125];

(5) A final sentence was deferred for six months on the basis that the Defendant may be able to regularise his position by obtaining approval for the premises to be used as a boarding house by obtaining a building certificate and lodging a development application for permission of such a use or by carrying out the works that were required to be undertaken: at [136] to [137]; and

(6) That an inspection of the premises would be undertaken in October 2016 to assess whether the Defendant had undertaken either of the options listed above to correct the contempt: [142].

Hutley v Cosco [2016] NSWLEC 15 (Pain J)

Facts: The Applicants and the Respondent own adjacent properties in Balmain. The Respondent is an owner-builder and was developing his land to construct a residential dwelling which would abut the Applicants' house. The development required excavation with the effect that there was a large drop-off from the Applicants' property into the Respondent's worksite, which the Applicants believed presented a safety issue. On 28 August 2015 consent orders were made by Craig J requiring that the Respondent construct a retaining wall and boundary fence within one month. This deadline was not met and on 14 October 2015 the Applicants commenced contempt proceedings against the Respondent for failing to comply with the 28 August orders. Throughout October, November and December the parties appeared before the Court on several occasions however the proceedings were unable to be resolved and the works the subject of Craig J's 28 August consent orders were not completed until early to mid-February 2016. The final hearing was held on 15 February 2016 by which time the works had been completed. The Applicants submitted that the contempt was deliberate and their costs should be paid on an indemnity basis. The Respondent submitted that the motion should be dismissed as his non-compliance with the 28 August orders was beyond his control and his actions were not wilful or deliberate, and further that the contempt had been purged. A second notice of motion filed by the Applicants was not finally resolved in the proceedings.

Issues:

(1) Whether the Respondent was guilty of civil contempt;

(2) Whether the contempt was deliberate;

(3) Whether any penalty was appropriate; and

(4) Whether an order for indemnity costs should be made.

Held: Respondent guilty of civil contempt, no penalty imposed, some costs awarded to the Applicants:

(1) The Respondent is guilty of civil contempt: at [13]. The retaining wall and fence was not built within the time frame specified by the orders: at [13]. On the final day of hearing on 15 February 2016 Counsel for the Respondent accepted a finding of guilt on the contempt charge;

(2) The failure to comply with the consent orders of 28 August 2015 was not deliberate but unintentional: at [16]. The Respondent obtained engineering advice immediately on the entering of the orders on 28 August 2015 and commenced works as soon as possible. These works continued more or less uninterrupted until the final completion of the works in the days leading up to the final hearing in February 2016. The height and length of the wall meant that its construction was significantly more complicated than expected: at [17];

(3) The particular circumstances of the case meant that a penalty for the civil contempt was not warranted: at [33]. The contempt was not wilful or contumacious and had been purged. The Respondent took consistent steps to comply with the orders however was unable to comply.

Therefore general and specific deterrence and denunciation were of less relevance in sentencing the Respondent in this case: at [33]; and

(4) No basis for awarding indemnity costs to the Applicants is established: at [38]. There is no fixed rule for how costs should be awarded in contempt proceedings and each case must be considered on its own facts: at [37]. There was no disentitling conduct of the Respondent to justify an order for indemnity costs, however as the Applicants reasonably commenced the proceedings and as the charge of civil contempt was established, the Respondent was ordered to pay the Applicants' costs on the ordinary basis: at [37]-[38].

- Civil Enforcement

Canterbury City Council v Burslem (No 2) [2016] NSWLEC 12 (Craig J)

(related cases: *Canterbury City Council v Burslem* [2007] NSWLEC 737 (Pain J)

Facts: Canterbury City Council (the Council) sought to enforce an order given to the Respondent pursuant to s 124 of the Local Government Act 1993 ("the Act") as a result of the accumulation of old, discarded and waste materials deposited around the curtilage of the Respondent's premises. The Council argued that the accumulated materials posed a public health risk and impeded easy access to and egress from the premises in the event of emergency, particularly one created by fire. The Council sought mandatory orders from the Court requiring that the Respondent remove waste material from the yard of his premises. In default, it sought an order allowing the Council to carry out that work pursuant to s 678 of the Act. The orders sought in the current proceedings were not dissimilar from those previously given to the Respondent and enforced by orders made in this Court on 8 October 2007 (*Canterbury City Council v Burslem* [2007] NSWLEC 737).

Issue:

(1) Whether the Court should exercise its discretion to enforce a s124 Order issued under the Act; and

(2) Whether it is appropriate for the Court to exercise its power under s 678 of the Act to direct the Council to carry out any work in respect of which the Respondent defaults.

Held: The Respondent breached the Act by failing to comply with the Order given to him. Orders made to carry out work required by Order but, in default, for Council to carry out work required:

(1) The Court has the power, at the instance of the Council, to make orders that seek to remedy the breach of the Act. The breach in the present case is the failure by the Respondent to have complied, within 28 days, with the order given to him under s 124 of the Act: at [15]; and

(2) The Respondent should be given one further opportunity to meet the requirements of the order. However, given that there is a history of the necessity for the Council to approach the Court to enforce an order directed to the removal of waste materials from the Property so as to address problems of public health and safety, the Court should exercise its power under s 678 of the Act to direct the Council to carry out any work in respect of which the Respondent defaults: at [18].

Chief Executive of the Office of Environment & Heritage v Turnbull (No 4) [2016] NSWLEC 66 (Craig J)

(related decisions: *Turnbull v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84 Preston CJ; *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112 Preston CJ)

Facts: Mr Grant Turnbull (the "Respondent") was the registered proprietor of a property (the "Property") used for farming at Croppa Creek on the Moree Plains. The Chief Executive of the Office of Environment and Heritage (the "Applicant") brought civil enforcement proceedings seeking a declaration (the "Declaration") that the Respondent had cleared native vegetation on the Property in contravention of s 12 of the *Native Vegetation Act 2003* (the "Act"). The Applicant also sought orders pursuant to s 41(5) of the Act that the Respondent be restrained from clearing or permitting the clearing of native vegetation on the Property (the "Restraining Order") and that the Respondent be required to take remedial action in

accordance with a detailed rehabilitation plan (the "Remediation Order"). Finally, the Applicant sought an order that the Respondent comply with a remediation direction given by the Court on 31 July 2014 pursuant to s 38 of the Act (the "Compliance Order"). The Applicant alleged that the aggregate area of native vegetation cleared was approximately 508ha, whereas the Respondent said that the area cleared was just under 30ha.

Issues:

(1) Whether the orders sought by the Applicant were a reasonable and proportionate response to the Respondent's contravention of s 12 of the Act;

(2) Whether the Declaration that the Respondent cleared native vegetation in breach of s 12 of the Act would serve any utility;

(3) Whether the Restraining Order was unnecessary given the Respondent's admission of contravening the Act and stated intention to comply with the Act;

(4) Whether the Remediation Order should be made in accordance with the Applicant's or the Respondent's remediation work plan; and

(5) Whether the Compliance Order was of sufficient utility to justify the Court entering such an order.

Held: Orders sought by the Applicant made; Respondent to pay the Applicant's costs:

(1) The Respondent's clearance of native vegetation in contravention of s 12 of the Act on the Property occasioned significant environmental harm and justified the making or an order to remedy the contravention: at [98];

(2) The Declaration sought was inappropriate considering that the contravention was not contested and that other orders were sufficient to announce on behalf of the community the Respondent's unlawful conduct: at [107]-[108];

(3) In light of the Respondent's history of native vegetation clearing, the Restraining order was necessary to ensure the Respondent's compliance with the Act: at [110]-[114];

(4) The Remediation Order was to be made in accordance with the Applicant's remediation work plan partly because of the consistency of its requirements with the remediation direction given by the Court on 31 July 2014: at [126]. There was no evidence that the cost of the Applicant's proposed Remediation Order was unduly onerous: at [129]; and

(5) Considering the breach of the remediation direction given by the Court on 31 July 2014, it was appropriate to make an order requiring compliance with the direction so as to transform an administrative direction into a court order: at [134].

Holroyd City Council v Khoury [2016] NSWLEC 18 (Pain J)

Facts: Holroyd City Council (the Council) sought a utility order pursuant to s 121ZS of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) in relation to premises in Wentworthville. The Respondent Mr Khoury did not appear at any point in the proceedings. The application was brought by the Council after Mr Khoury failed to comply with an order made pursuant to s 121B of the EPA Act to cease the use of the premises as a boarding house, being a use prohibited in the regulations.

Issues:

(1) Whether Mr Khoury was aware of the s 121B order;

(2) Whether Mr Khoury was aware of the s 121ZS proceedings;

(3) Whether the prohibited use of the premises as a boarding house had continued beyond the date of the order to cease use (s 121ZS(3));

(4) Whether the failure to comply with the order to cease use as a boarding house had caused or was likely to cause a significant adverse impact on health, safety or public amenity (s 121ZS(4));

(5) Whether the other procedural requirements in s 121ZS were satisfied by the Council; and

(6) Whether an order for the payment of costs should be made pursuant to r 3.7 of the Land and Environment Court Rules 2007 (NSW).

Held: S 121ZS utilities order made, costs awarded to the Council:

(1) Mr Khoury was aware of the s 121B order issued by the Council as he lodged an appeal against the order and appeared in the appeal proceedings, and the orders made by the Court in the appeal proceedings were served upon Mr Khoury: at [34];

(2) Mr Khoury was aware of the s 121ZS proceedings. The Court made substituted service orders under r 10.14 of the Uniform Civil Procedure Rules 2005 (NSW) on 21 January 2016. These orders were not fully satisfied by the Council and further orders for substituted service were made on 29 January 2016 and 23 February 2016. At the final hearing the Court was satisfied that the orders had been complied with and that the effect of the carrying out of those orders was that the proceedings had been brought to the attention of Mr Khoury: at [34]-[38];

(3) There was more than sufficient evidence to establish that the existing use of the premises was as a boarding house: at [39]. Evidence of Council staff as to their investigations at the premises satisfied the definition of a 'boarding house' in the Holroyd Local Environment Plan 2013 (NSW), with rooms let separately with private kitchens and bathrooms, stay periods of three to six months and at least one communal area: at [39];

(4) The expert evidence of the Council's accredited certifier established that there was a significant fire risk present at the premises and therefore s 121ZS(4) was satisfied: at [41]; and

(5) The procedural requirements in s 121ZS were met as seven days' notice was given to the utilities providers, and sufficient notice was also given to Mr Khoury and the occupants of the premises: at [41]; and

(6) It is fair and reasonable that Mr Khoury pay the Council's costs as agreed or assessed: at [47]. Mr Khoury failed to comply with the s 121B order for a lengthy period and his conduct prior to the commencement of proceedings left the Council with little choice but to take legal action: at [48]. Mr Khoury's conduct during the proceedings was unreasonable: at [46].

- Valuation/Rating

Christophers v Roads and Maritime Services [2016] NSWLEC 11 (Craig J)

Facts: By a notice of motion filed on 22 February 2016 the Applicant sought to review the decision of the Registrar made on 17 February, fixing 7 April 2016 as the date for a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW). The Applicant sought a later date. The Respondent did not oppose that course. The substantive proceedings concerned a claim for compensation pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

Issues: Whether the availability of counsel and the inconvenience of, and costs associated with, retaining alternate counsel for a s 34 conciliation conference are sufficient reasons to exercise the Court's discretion to review of the Registrar's decision under r 49.19 of the Uniform Civil Procedure Rules 2005 ("UCPR").

Held: Notice of motion dismissed and the Registrar's decision affirmed:

(1) There is an onus on a person seeking to have a court set aside or vary a registrar's decision to make out a case that the court, in the interests of justice, should exercise its discretion to do so. In the case of a decision on practice or procedure, this will normally require at least demonstration of an error of law, or a *House v The King* error, or a material change of circumstances, or evidence satisfying the strict requirements for fresh evidence: at [3];

(2) Ordinarily, the unavailability of particular counsel does not provide a substantial reason to overturn a decision by the Registrar fixing a hearing date. While Counsel's availability may provide a substantial reason in situations where particular counsel has had a long involvement in the proceedings, that situation may be distinguished from the present case, where little had happened beyond the filing of the application commencing the proceedings and directions given for the conduct of a s 34 conference. Accordingly, while it is understandable that the Applicant would wish the desired counsel to attend such a conference, the necessity for that to occur has not been demonstrated in the present case: at [14]; and

(3) The Applicant did not identify any error on the part of the Registrar in fixing the date for the s 34 conference.

Dial A Dump Industries Pty Ltd v Roads and Maritime Services [2016] NSWLEC 39 (Preston CJ)

Facts: Land at St Peters ("Lot 2") was compulsorily acquired by the WestConnex Delivery Authority ("WCDA") for the WestConnex Motorway on 19 December 2014. Under s 37 of the Land Acquisition (Just Terms Compensation) Act 1991 (the "Land Acquisition Act"), each owner of an interest in Lot 2 that was divested, extinguished or diminished by the compulsory acquisition became entitled to compensation. On the acquisition date, Alexandria Landfill Pty Ltd ("ALF") was the registered owner of the estate in fee simple of Lot 2 and Boiling Pty Limited ("Boiling") was the lessee of Lot 2. Dial A Dump Industries Pty Ltd (the "Applicant") asserted that it had permission to use and occupy Lot 2 to operate a waste landfill and carry out crushing, grinding and separating works. On 14 August 2015, the Applicant commenced proceedings, under s 67(1) of the Land Acquisition Act, to challenge the rejection of its claim for compensation by WCDA. Subsequently, the Court ordered that Roads and Maritime Services be substituted for the WCDA as the Respondent. On 29 October 2015, the Court ordered the hearing and determination of a separate question. The Applicant claimed it had an interest in land as defined by the Land Acquisition Act by reason of having an equitable interest, a legal interest or a right, power or privilege in, over or in connection with Lot 2 on the acquisition date.

Issues:

(1) Whether the Applicant had an equitable interest in Lot 2 flowing from any rights that the Applicant had in relation to a trust administered by Boiling, the Dial A Dump Industries Trust (the "Trust");

(2) Whether the Applicant had a legal interest in Lot 2 flowing from ALF and Boiling, as the registered proprietor and lessee respectively, permitting the Applicant to occupy Lot 2 to carry out a waste facility business;

(3) Whether the Applicant had a right, power or privilege over, or in connection with, Lot 2 flowing from ALF and Boiling permitting the Applicant to be on Lot 2 and/or environmental protection licences held by ALF and Boiling under the Protection of the Environment Operations Act 1997 ("POEO Act").

Held: Proceedings dismissed, Applicant to pay the Respondent's costs of the motion for a separate question:

(1) The Applicant did not establish that it had an equitable interest in Lot 2 flowing from any rights that the Applicant had in relation to the Trust: at [84]. The Applicant did not have an equitable interest in the lease of Lot 2 commencing 1 January 2014, which was operative at the date of acquisition: at [85]. Even if this lease had been part of the Trust fund, which was not established, the Applicant did not have any beneficial interest in that lease or any other trust property: at [86]. As the object of a bare power of appointment in a discretionary trust, the Applicant did not have any proprietary interest in the assets of the Trust: at [88].

(2) The Applicant did not have an equitable interest in land by reason of any rights to enforce the due administration of the Trust: at [93]. This equitable right did not give the Applicant any beneficial interest in any part of the Trust property: at [92].

(3) The Applicant did not establish that it had any legal interest in Lot 2 flowing from any permission it had to occupy Lot 2 to carry out commercial operations: at [122]. The Applicant did not establish how or on what terms any permission was granted. Any permission to occupy Lot 2 given by ALF or Boiling was purely personal and did not give rise to the Applicant having any proprietary interest: at [94].

(4) The Applicant did not establish that it had any right, power or privilege over or in connection with Lot 2 flowing from any permission to carry on commercial operations on Lot 2: at [123]. For the Applicant to have had a right, power or privilege in Lot 2, the permission given to the Applicant had to be of a proprietary or quasi-proprietary nature: at [125]-[145]. The Applicant's mere personal permission to occupy Lot 2 was not a right, power or privilege in Lot 2 of a proprietary or quasi-proprietary nature: at [139].

(5) The Applicant did not establish that it had any right, power or privilege over or in connection with Lot 2 due to it being permitted by ALF and Boiling to use their environmental protection licences

concerning Lot 2: at [146]. Under the POEO Act, ALF and Boiling could not grant any permission to the Applicant to use the environmental protection licences and the Applicant could not acquire any privilege of carrying out activities authorised by these licences: at [150].

- Section 56A Appeals

Gray v Sutherland Shire Council [2016] NSWLEC 64 (Craig J)

(related decision: *Gray v Sutherland Shire Council* [2015] NSWLEC 1102 (Morris C))

Facts: Mr Robert Gray (the "Appellant") sought development consent from Sutherland Shire Council (the "Respondent") to demolish two existing dwellings and build a two storey boarding house with associated facilities. The Appellant appealed the Respondent's decision to refuse to grant development consent pursuant to s 97(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). A Commissioner of the Court dismissed the appeal and refused to grant development consent. A proposed condition of development consent ("the Condition") required that the boarding house development adhere to an operational plan of management (the "POM"). Clauses 5 and 6 of the POM contained minimum boarder eligibility and rental requirements for boarding house tenants, including a minimum income requirement. The Commissioner determined that the Condition, and therefore the requirements in cll 5 and 6, could not lawfully be imposed. Consequently, the Commissioner held that the development would have unacceptable adverse social impacts.

Issues:

(1) Whether the Condition, which required adherence to the POM, was for a proper planning purpose;

(2) Whether the Condition was manifestly unreasonable;

(3) Whether the Condition could lawfully be imposed; and

(4) Whether the site of the proposed development was suitable for the proposed development.

Held: Appeal upheld; Respondent to pay the Appellant's costs:

(1) The Commissioner was in error in determining that that the Condition was not for a proper planning purpose: at [46]. The Condition was directly referable to the mandatory relevant matter for consideration in s 79C(1)(b) of the EPA Act (at [48]) and served the planning purpose of preventing the development from causing unacceptable social impacts: at [49]. Contrary to the Commissioner's finding, the fact that the Condition would exclude "very low income" or "low income" boarders was an effect of the Condition rather than its purpose: at [49]. The definition of "affordable housing" in the State Environmental Planning Policy (Affordable Rental Housing) 2009 (the "SEPP") did not require all affordable housing developments to provide for all three income groups included in that definition: at [50];

(2) The Commissioner was in error in determining that that the Condition was manifestly unreasonable: at [65]. The fact that the POM had the effect of excluding "very low income" and "low income" boarders from residency did not make the Condition unreasonable: at [69]. The Commissioner's finding that this exclusion was unreasonable was based on an incorrect understanding of the relevant statutory definition of "affordable housing": at [69]. As a means of giving effect to the planning purpose of preventing unacceptable social impacts, the Condition fell within the range of means by which that objective could be achieved: at [70];

(3) As the Condition was for a proper planning purpose and was not manifestly unreasonable, the Commissioner was in error in determining that the Condition could not lawfully be imposed: at [73]; and

(4) The Commissioner's determination that the site of the development was not suitable for the proposed development was expressly based on the Commissioner's antecedent reasoning concerning the lawfulness of the Condition. Therefore, the Commissioner's determination could not be sustained: at [75].

- Separate Question

Bradfield v Roads and Maritime Services [2015] NSWLEC 203 (Pain J)

Facts: These proceedings concerned the determination of the separate question of whether the Applicant had an interest in land as defined in s 4 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Just Terms Act). If the separate question were answered in the affirmative, the Applicant would be able to found a compensation claim following the acquisition of land by the Roads and Maritime Services (RMS). The Applicant had occupied a house on land owned by his parents since 1992, and worked on the surrounding farm, for which he was not paid. In 1998 his father died and bequeathed the house to the Applicant, however as it was held in joint tenancy with his mother the gift was to no effect. The Applicant's mother also intended that the house should be bequeathed to the Applicant. In 2010 the Applicant temporarily relocated to care for his mother but continued to pay rates and services for the house in question and considered it his permanent address.

Issue:

(1) Whether the Applicant had an interest in the land as defined in s 4 of the Just Terms Act.

Held: Answering the separate question in the affirmative:

(1) The Applicant had an interest in land as defined in par (b) of the definition in s 4 of the Just Terms Act as at least a right in the property of another or a quasi-proprietary interest: at [38]. The arrangement between the Applicant and his parents and then his mother after his father's death had been ongoing for 22 years. That arrangement was not a contractual arrangement which gave rise to an enforceable right to occupy as against the Applicant's mother: at [36]. The Applicant did not therefore have exclusive possession but he did have exclusive possession as against third parties: at [36]. A par (b) interest in land is not conditional on the claimant having exclusive possession. The Applicant had at least a right of occupancy on a more secure footing than a bare licence, because of the informal arrangement with his mother, his payment of rates and services and the length of time he had occupied the house lot: at [36]. Following authority, an expansive approach should be taken to the definition in par (b), and a broad range of interests can fall under that definition as being rights in connection with land that are not proprietary: at [39].

McCudden v Cowra Shire Council [2016] NSWLEC 14 (Craig J)

Facts: Mr Richard McCudden (the "Applicant") occupied land at Cowra (the "Land") where he conducted a shelter for unwanted cats. On 6 August 2015, Cowra Shire Council (the "Respondent") issued an order (the "Order") to the Applicant under s 124 of the Local Government Act 1993 (the "Act") directing him to constrain the manner in which cats were kept on the Land and to restrict the number of cats on the Land to a maximum of 33 cats. After filing an appeal against the Order, the Applicant sought the determination of separate preliminary questions relating to the validity of the Order. On 10 December 2015, Biscoe J ordered that four preliminary questions be determined.

Issues:

(1) Whether the Order was only given for one identified reason, namely, to ensure the welfare of cats on the Land;

(2) If so, whether this reason given for the Order was a relevant consideration under s 124 of the Act and, if not, whether the Respondent was empowered to give the Order when it was issued;

(3) Whether the reasons given for the Order were adequate and, if not, whether the Respondent could lead and rely upon evidence to enhance those reasons; and

(4) Whether, if the Order was invalid, the Court had the power to modify the Order or substitute the Order for a new order under s 180 of the Act.

Held: Preliminary questions for determination answered:

(1) Reading the Order as a whole, the Order was given for three reasons: at [39]-[40]. The Applicant's contention that there was only one reason for giving the Order was the result of erroneously interpreting the Order as if it were a statute: at [29];

(2) Even if, contrary to the above finding, the Order was only given to ensure the welfare of cats, this was a relevant consideration under the Act and, even if irrelevant, the Respondent would still be empowered to make the Order: at [74];

(3) The reasons stated in the Order adequately exposed the rationale for giving the Order and satisfied the requirements of the Act: at [87];

(4) If, contrary to the above finding, the reasons given were inadequate, the Respondent would be able to lead and rely upon evidence directed to those reasons: at [99]; and

(5) Even if it were assumed that there no reasons for the Order, the Order would not be invalid and the Court would remain empowered to exercise its discretion under s 180 of the Act to modify the Order or make a substitute order: at [150].

Rural Funds Management Limited v The Minister Administering the Water Management Act 2000 [2016] NSWLEC 19 (Moore J)

Facts: The separate question set down by Preston CJ was whether the appeal under s 368(1)(h) of the *Water Management Act 2000* (the Water Management Act) filed December 2015 was brought within time.

The statutory framework under the Water Management Act provides the Minister or the Minister's delegate the power to determine, either by refusal or approval, applications for a range of activities, including water supply works. Significant to these proceedings, s 95(5) of the Act states that an approval takes effect on the day on which notice of the decision to grant the approval has been given to the Applicant.

Through her determination, the Minister's delegate approved the water supply works on 23 October 2015 and that approval was transmitted by email by an employee of the Department on the same day. Section 98 of the Act mandates with respect to approvals which have been advertised, that the Minister must cause notice of the determination to be given to each persons who has made an objection to the Minister in connection with the Application. This notice was not dispatched in a timely fashion as the determination was posted by letter to the Applicant some 32 days after the Minister's delegate's determination.

Section 368(3) of the Water Management Act states that an appeal to the Land and Environment Court of NSW may not be made more than 28 days after the date on which the relevant decision was made. The Applicant and First Respondent argued that on the proper statutory construction of the provision the relevant date of decision was either the date the notice was dispatched to the Applicant or when the letter was received bringing the appeal within time. Conversely, the Second Respondent submitted that the clear and ordinary effect of the provision was that the correct date was that of the events which transpired on 23 October 2015, rendering the appeal out of time.

Issues:

(1) On the proper statutory construction of s 368(3) of the Water Management Act, when did the 28-day limitation period, for an objector to lodge and appeal, commence?

Held: Dismissing the appeal in the substantive proceedings:

(1) Taking the position on importing terms at its widest, as advocated by the Applicant and First Respondent, would provide a significant potential for uncertainty concerning application of the provisions of the Water Management Act: at [52];

(2) The relevant date from which the time period starting running was the date the Minister's Delegate made her determination and the approval was transmitted to the Second Respondent (23 October 2015): at [55]; and therefore

(3) With no express power to extend the limitation period, the appeal was out of time and was dismissed: at [54].

Tomasy Pty Ltd v Pittwater Council [2016] NSWLEC 40 (Pain J)

Facts: These proceedings concerned the determination of a separate question being whether the development proposed by the Applicant was permissible within the 1(a) Non-Urban Zone of the *Pittwater Local Environmental Plan 1993 (NSW)* (the LEP). The Applicant, a planning and property consultancy, prepared the development application in question for Matthews Contracting Pty Ltd (Matthews), a civil contracting business. Pittwater Council (the Council) had refused Matthews' application for a development described in the DA as "use…for the purposes of an industry associated with extractive industries" being the construction of a shed, truck wash bay, rainwater tanks and car parking, with an existing office building to be retained. In the Statement of Environmental Effects submitted with the DA the application was described as one to use the "subject site to store and maintain vehicles, machinery and materials associated with the activities of Matthews…which carries out excavation, civil works and demolition". The Council's refusal was on the basis that the application was for a prohibited use, namely commercial premises. The Applicant argued that the proposed development was "an industry" "for the purposes of an industry associated with extractive industries" and therefore exempt from classification as prohibited development under the LEP.

Issues:

(1) Whether it was permissible in construing the proposed development's purpose to look at Matthews' activities off-site;

(2) Whether the proposed development was "an industry" within the definition in the LEP;

(3) Whether the proposed development was an industry "directly associated or connected with, or dependent upon, extractive industries"; and

(4) Whether the proposed development was for "commercial premises" within the definition in the LEP.

Held: Answering the separate question in the negative:

(1) In classifying a development what must be considered is the purpose of the use of the land the subject of the DA: at [13]. Activities taking place off-site may provide relevant context for what is sought in a DA but what is being applied for in the DA cannot be ignored: at [13];

(2) The on-site works the subject of the DA and the uses of the land do not satisfy either of the two limbs of the definition of "an industry" in the LEP: at [14]. The application of the definition of manufacturing process to Matthews' building and construction work because it was said to involve assembling, breaking up or adapting goods or articles, which essentially were defined to mean anything, rendered the definition meaninglessly broad: at [15];

(3) As the proposed development was held to not be "an industry" the question of whether it was an industry associated with extractive industries did not need to be resolved: at [17]; and

(4) The development application is properly characterised as one for commercial premises: at [16]. The works and identified activities the subject of the DA satisfied the first part of the definition in the LEP as a building or place used as an office or for other business or commercial premises. No other definition in the LEP applied and therefore the second limb of the definition of commercial premises does not operate to exclude the proposed development from the definition of commercial premises: at [16].

- Miscellaneous

Botany Bay City Council v Skyton Developments (Aust) Pty Ltd (In Liq) [2016] NSWLEC 20 (Preston CJ)

Facts: Botany Bay City Council (the "Applicant") applied by notice of motion to restore a matter that had been disposed of on 1 July 2008, by the Court making orders by consent, to seek a further order. The proceedings had initially been brought by the Applicant against three Respondents for allegedly carrying out development otherwise than in accordance with a development consent. Order 3 of the 1 July 2008 Court orders had required the carrying out, maintenance and rectification of basement waterproofing works to a specified standard. Order 14 granted the parties liberty to restore for the purpose of implementation of the orders. The Applicant's proposed further order was intended to compel the carrying

out of basement waterproofing works in a particular way and to a specified standard. Mr Andrews (the "Third Respondent"), who was the former owner of the relevant land, opposed the notice of motion and sought its dismissal. The Third Respondent filed a separate notice of motion seeking the determination of the separate preliminary question set out as issue 1.

Issues:

(1) Whether the Court had the power to make the further order sought by the Applicant;

(2) Whether the Applicant's further order fell within the scope of the liberty to restore reserved by Order 14 of the Court orders of 1 July 2008;

(3) Whether the obligations in Order 3 of the 1 July 2008 Court orders to carry out, maintain and rectify waterproofing works were time limited.

Held: Notice of motion dismissed; Applicant to pay the Third Respondent's costs:

(1) The two obligations under Order 3, to carry out waterproofing works and to maintain and rectify such works, were linked and therefore, both time limited: at [29]. As the time limit for carrying out waterproofing works under Order 3 had expired, the Court could not make a new order to implement or enforce the expired order: at [28];

(2) The Applicant's further order would impose a new order or substantially varied Order 3: at [30];

(3) The Applicant's further order was outside the scope of the liberty to restore reserved by the Court orders of 1 July 2008. Therefore, the Court did not have the power to make the further order: at [31].

- Commissioner decisions

Cracknell & Lonergan Architects Pty Ltd v Council of the City of Sydney [2016] NSWLEC 1159 (O'Neill C)

Facts: The Applicants appealed under s 97(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the refusal by the Council of the City of Sydney to grant consent to alterations and additions to an existing building, including a new third level and use of the building as 12 serviced apartments and a café at 461 Harris Street, Ultimo. The existing building was identified as contributory to the Ultimo Heritage Conservation Area (Ultimo HCA).

Issue:

(1) Whether the exceedance of the floor space ratio (FSR) development standard was justified.

(2) Whether the proposal to remove substantial building elements including the roof and the internal floors was contrary to the heritage conservation objectives in the planning instrument.

Held: Refusing the appeal:

(1) The proposal could not be described as an adaptive re-use of the existing building, because adaptive re-use is more akin to recycling a building, whereas the proposal was to retain parts of two facades and gut the interior of the existing building. Adaptive re-use means adapting a place to suit the existing use or a new use (The Australia ICOMOS Charter for Places of Cultural Significance, 2013). This building has been significantly modified and a robust architectural solution may be appropriate as a new and contemporary layer to the existing, including new insertions and additions; however the proposal fundamentally failed to respect the integrity of the existing fabric, making it unsympathetic to the existing building and eroding the contribution the existing building made to Ultimo Conservation Area. Adaptively re-using a building means coming to terms with the existing fabric, juggling the constraints and opportunities it presents and using the existing fabric to provide a stimulus for the re-interpretation of the building: at [26];

(2) The contributory value of the building to the conservation area was not only its external appearance and streetscape presence. The retention of two façades with a new internal structure that bears no relationship to the openings of the retained facades would not maintain the contribution the building made to the collective heritage significance of the Ultimo Conservation Area: at [27];

(3) The proposal's increase of floor space did not achieve a better outcome and did not warrant flexibility in applying the FSR development standard: at [28]; and

(4) Compliance with the FSR development standard was not unreasonable or unnecessary in the circumstances, because the proposal was being inconsistent with an objective of the FSR development standard: at [29].

PRJM Pty Limited v Hawkesbury City Council [2016] NSWLEC 1217 (Dixon C)

Facts: The Applicant sought development consent for a 150 site caravan park for long term residences on land located at Glossodia (the site).

The site has an area of 8.66ha and presently contains a dwelling, garage, dam and two yards.

The site is located within the R2 Low Density Residential zone under *Hawkesbury Local Environmental Plan 2012* (HLEP 2012), and the caravan park use is permissible with consent. In determining the application Cl 2.3(2) of the HLEP 2012 requires a consideration of the objectives for development in the zone, namely: "to provide for the housing needs of the community within a low density residential environment", "to protect the character of traditional residential development and streetscapes" and "ensure that new development retains and enhances" that character.

The development will introduce 417 new permanent residents into Wattle Crescent, and according to the local objectors this will adversely impact upon the present amenity of their *"quiet, open spaced rural residential streetscape"*.

Issues:

(1) Whether the development can be described as being low density and will be consistent with the objective outlined in bullet-point 1 of the R2 Low Density Residential Zone in part 2 of the Hawkesbury Local Environmental Plan 2012 (HLEP 2012):

> *To provide for the housing needs of the community within a low density residential environment.*

(2) Whether the development will be consistent with the objectives outlined in bullet-points 3 and 4 of the R2 Low Density Residential Zone:

> *To protect the character of traditional residential development and streetscapes.*

and

> *To ensure that new development retains and enhances that character.*

(3) Whether the development application satisfies the matters for consideration listed in cl 10 of the State Environmental Planning Policy No 21 (SEPP21).

(4) The relevance of the Council's Hawkesbury Residential Land Strategy (the Strategy) to the proposed development and the statutory weight (if any) which should be applied.

(5) Whether or not approval of the development would be in the public interest.

Held: Appeal dismissed:

(1) The proposed development does not offer a "low density residential environment" at [48]. Density is best measured by having regard to the developed area of the site "the area taken up by the buildings and associated setbacks and open spaces which contribute to the area's sense of compactness …" at [43]; it is inappropriate to divide the area of the entire site by the number of dwellings created to derive a lot size and then apply the usual low density minimum lot size to the subject land to support a conclusion that the development is low density at [46].

(2) The term "traditional residential development "is not a defined planning term which can be characterised by one single entity at [58]. It is dependent on the character /nature of the development which has been maintained within the locality, including subdivision patterns and allotment sizes, open spaces and landscaping, building locations and separation, setback and building sizes and densities at [58]; the proposed development does not contain any of the identified characteristics of the immediate locality; development comprising the construction of 151 (including the manger's

residence) densely clustered dwellings on the site is not consistent with the existing low density residential environment within this northern section of Glossodia [62];

(3) Clause 10 of the SEPP21 applies to the development of a caravan park for long term residences at [64];

Clause 10 of SEPP 21 provides that the Court may consent to a development application only after it has considered the matters listed in that clause at [78];

The clause is not interpreted differently, depending upon where the caravan park is proposed; the terms of the clause do not differentiate between caravan parks in different areas of NSW. The consideration invited by the SEPP 21 goes to the availability and reasonable accessibility of those facilities and services to the occupants of the caravan park at [78].

The development is likely to generate a population of 417 people at [80]. It is reasonable to assume that the occupants of the caravan park will be dependent upon existing public transport services and private services unless they have access to a car at [68];

There is no information before the Court about the availability of these existing facilities and services for the occupants of the park or any extension of these existing public transport services to accommodate the needs of the occupants of the park; the Applicant has not investigated the availability of existing services and facilities in respect of the local childcare, school, before and after school care at [86].

As there is insufficient information before the Court to enable it to undertake the consideration required particularly cl10 (d) the Court cannot grant consent to the development at [87].

(4) The Hawkesbury Residential Land Strategy has no statutory weight in this case. It is a high level strategic document and forms part of the background context of the application. At its highest it is relevant under the public interest at [89].

(5) The application has generated significant public objection and the evidence of the residents summarised at [20-29] lends support to the Council's submission that this site is simply not suitable for the proposed development and is not in the public interest: s79C (1) (c) and (e) of the EPA at Act at [94].

Civil & Administrative Tribunals

Bennison v NSW Department of Premier and Cabinet [2016] NSWCATAD 101 (Montgomery SM)

Facts: The Applicant sought review by the NSW Civil and Administrative Tribunal ("the Tribunal") of a decision of the Respondent made pursuant to s 58(1)(d) of the Government Information (Public Access) Act 2009 ("the GIPA Act") in response to a request for access to documents relating to the engagement of KPMG by the NSW Government to provide certain advice on local government reform across the State. The Respondent was responsible for instructing KPMG, and in 2015 commissioned it to provide reports being a Business Case outlining a cost benefit analysis of mergers; options analysis documents that informed the business case; merger proposals and drafts; a macro-level report outlining the high-level benefits of mergers; and a technical paper outlining the assumptions used to model benefits. KPMG was instructed that the documents it was preparing were for submission to Cabinet or were inputs for Cabinet documents. The Applicant requested access to copies of briefs, file notes, emails and other documents provided to KPMG; all versions of reports prepared by KPMG; reports and documents provided by KPMG to Ministers; file notes, emails and other documents between Ministers and representatives/employees; and presentations/documents provided to Ministers for the Cabinet meeting held on or about 17 December 2015 that formed the basis for the merger recommendations announced on 18 December 2015. In response to the request the Respondent identified 109 documents that fell within the scope of the access application, and determined that in regard to the information which it held, released some of the information requested and refuse access to other information on the basis that there was an overriding public interest against disclosure of that information. The Respondent did not release the information in records 1-63 and 100-109 on the basis that it was "Cabinet information" within the meaning of cl 2(1) of Sch 1 to the GIPA Act. The Applicant indicated that he only sought access to documents 1-4, and 6-63.

Clause 2 of Sch 1 to the GIPA Act establishes a conclusive presumption of an overriding public interest against disclosure of Cabinet information, as defined in cl 2(1)(a)-(f). Clause 2(4) provides that information is not Cabinet information to the extent that it consists solely of factual material unless the information would reveal or tend to reveal (a) information concerning any Cabinet decision or determination or (b) the position that a particular Minister has taken, is taking or will take on a matter in Cabinet. Section 106 of the GIPA Act provides a special procedure for decisions by the Tribunal in respect of Cabinet and Executive Council information. The Tribunal is limited to deciding whether there were reasonable grounds for the agency's claim and is not authorised to make a decision as to the correct and preferable decision on the matter (s 109(1)); if it is not satisfied by evidence on affidavit or otherwise that there are reasonable grounds for the claim, it may require the information to be produced in evidence (s 109(2)); and if the Tribunal is still not satisfied, it is to reject the claim when determining the review application and may then proceed to make a decision as to the correct and preferable decision on the matter (s 109(3)).

The Respondent relied on the evidence of its General Counsel, Mr Paul Miller, who provided affidavit evidence and appeared at the hearing and was cross examined. Mr Miller stated that he had sought information from other employees of the Respondent and relied on the information he was given, conceding in cross examination that he did not have direct knowledge of relevant issues. The other employees did not provide direct evidence. Mr Miller's evidence was that he had looked at the documents and scanned their contents and was aware of the progeny of the documents and the circumstances in which they were prepared and said that he was able to confirm that they contained Cabinet information. He considered that disclosure would adversely affect proceedings of Cabinet and the quality of advice to Cabinet and thereby inhibit Cabinet's decision-making process, and would tend to mute and impede discussions and deliberations of Cabinet.

Issues:

(1) Whether there were reasonable grounds for the claim that there was an overriding public interest against disclosure of the information in records 1-4 and 6-63 because the information was Cabinet information; and

(2) Whether the Tribunal should require the information to be produced.

Held: Affirming the decision under review insofar as it related to records 1-4, and 6-63, and listing the matter for further directions to progress the remaining aspects of the application relating to the Respondent's determination that it did not hold any documents falling within the scope of the remaining paragraphs of the access application:

(1) The Tribunal was not bound by the rules of evidence and hearsay evidence was permissible: at [22]. Mr Miller's knowledge and experience were clearly relevant to the matter: at [25]. Mr Miller's evidence was accepted notwithstanding that some of that evidence was hearsay and could not be tested: at [30];

(2) In relation to records 1-4, being "Implementation of Local Government Mergers: Business Case", and draft versions of that document, Mr Miller's evidence was that while the documents contained some factual material they also contained analysis and comment and if released would reveal the position that the Minister for Local Government ("the Minister") had taken on a matter in Cabinet. There were reasonable grounds for the claim that records 1-4 contained Cabinet information and there was therefore an overriding public interest against disclosure of that information: at [44], [45];

(3) In relation to records 53-63, being "Local Government Reform: Merger Impacts and Analysis Report", and draft versions of that document, the evidence of Mr Miller that he had been told that the document was prepared for the dominant purpose of submission to Cabinet and that he had looked at the documents and formed his own view, was accepted. There were reasonable grounds for the claim that record 57 was prepared for the dominant purpose of being submitted to Cabinet for Cabinet's consideration and was in fact so submitted, and for the claim that records 53-56 and 58-63 were draft versions of record 57. There were reasonable grounds to the claim that records 53-63 contained Cabinet information for the purposes of cl 2 of Sch 1 to the GIPA Act and there was therefore an overriding public interest against disclosure of that information: at [49]-[51];

(4) In relation to records 6-52, titles "KPMG-Options Analysis", Mr Miller's evidence was that release would have the effect of revealing the various positions that the Minister was considering taking on the matter of local government reform for the purposes of a discussion in Cabinet. His evidence that

none of the records consisted solely of factual material was accepted: at [56]. His evidence that it would be possible to ascertain from the information included in the records the position the Minister had taken in Cabinet was accepted: at [63]. There were reasonable grounds for the claim that records 6-52 contained information that the Minister was considering taking on the matter in Cabinet, and that being the case, the Respondent's evidence satisfied the requirements of s 106(1) of the GIPA Act: at [66]; and

(5) On balance it was not necessary that the Tribunal view and consider the documents that had been withheld: at [67].

Court News

Arrivals/Departures

On 6 June 2016, Justice Malcolm Craig retired as a judge of the Land and Environment Court (having served since his appointment on 2 March 2010).

On 10 June 2016, Attorney General Gabrielle Upton announced the appointment of barrister John Robson SC as a judge of the Land and Environment Court. View the media release. Mr Robson SC was sworn in on 5 July 2016.