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Land and Environment Court of NSW Judicial Newsletter

Legislation

- Statutes

Environmental Planning and Assessment Amendment (Transitional Arrangements) Regulation 2010 — published 12 February 2010. The object of this Regulation is to amend the Environmental Planning and Assessment Regulation 2000 as follows:

(a) to confirm that the former plan-making provisions of Pt 3 of the *Environmental Planning and Assessment Act* 1979 (repealed on 1 July 2009) continue to apply to draft local environmental plans if the Director-General was informed of an intention to prepare the plans (under s 54 of that Act as so repealed) before 1 July 2009;

(b) to enable local environmental plans to which the former plan-making provisions apply as a result of the proposed regulation to proceed under those provisions relying on things previously purported to have been done or omitted in accordance with the former provisions. That provision will not apply to the proposed local environmental plan for South Tralee that was subject to proceedings in *Capital Airport Group Pty Ltd v Director-General of the Department of Planning* [2010] NSWLEC 5; and

(c) to make it clear that amending local environmental plans to which the former plan-making provisions apply include plans containing repeals.

For further information see Planning Circular PS 10 –002, issued by the Department of Planning on 18 February 2010.

Environmental Planning and Assessment Amendment (Miscellaneous) Regulation 2010 — published 26 March 2010. This Regulation amends the Environmental Planning and Assessment Regulation 2000 as follows:

(a) to insert an updated definition of *capital investment value* and make a consequential amendment;

(b) to require the consent of an owner of land to a request for modification of a project approval under Pt 3A of the *Environmental Planning and Assessment Act* 1979 if the owner's consent to the original project application was required;

(c) to make it clear that the consent of an owner of land is required for a project application to the extent that it relates to mining or petroleum production on any part of the land that is a state conservation area reserved under the *National Parks and Wildlife Act* 1974;

(d) to clarify the effect of the declaration of a project under Pt 3A of the *Environmental Planning and Assessment Act* 1979 on existing development consents under Pt 4 of that Act and existing approvals under Pt 5 of that Act;

(e) to enable development consents granted by the Minister for Planning under former provisions relating to State significant development, or subsequently by the Land and Environment Court, to be modified under Pt 3A of the *Environmental Planning and Assessment Act* 1979 as if they were approvals under that Pt;

(f) to remove the requirement for the Minister for Planning to make arrangements for the preparation of an infrastructure plan relating to the infrastructure requirements of growth centres;

(g) to remove the requirement for the Minister for Planning to consult public authorities about declarations that a growth centre precinct or part of a growth centre precinct is released for urban development;

(h) to delay, for a further 12 months (until 28 February 2011), the implementation of the requirement for a certificate or report by a fire safety engineer before a complying development certificate or construction certificate may be issued for work on certain buildings involving an alternative solution under the *Building Code of Australia* in respect of a fire safety requirement;

(i) to insert a note in the Schedule relating to planning certificates about the requirements relating to such certificates that are specified in the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* 2009;

(j) to enable penalty notices to be issued for breaches of the requirement to comply with the conditions of a project approval under Pt 3A of the *Environmental Planning and Assessment Act* 1979; and

(k) to make savings and transitional provisions consequent on the commencement of the *Aboriginal Land Rights Amendment Act* 2009.

For further information see Planning Circular PS 10–005, issued by the Department of Planning on 24 March 2010.

The *Fisheries Management Amendment Act* 2009, except for Aboriginal cultural fishing in Schedule 1, commenced on 1 April 2010.

The accompanying Fisheries Management Legislation Amendment Regulation 2010 was published 26 March 2010. The object of this Regulation is to amend the Fisheries Management (General) Regulation 2002 as follows:

(a) to prescribe work that involves the removal of certain material from water land as dredging work for the purposes of provisions of the *Fisheries Management Act* 1994 (the Act) relating to the management of dredging and reclamation work so that a permit will be required to carry out such work;

(b) to increase the penalty payable for the offence of damaging salmon or trout spawning areas;

(c) to prescribe saltmarsh on public water lands as marine vegetation that is protected under the Act;

(d) to provide a defence to a prosecution for possessing protected fish from the Pegasidae, Solenostomidae and Syngnathidae families (commonly known as seamoths, seahorses, pipefish and seadragons) if they are exhibited in an aquarium or used in the aquarium industry and were lawfully taken from or lawfully cultivated in waters of another jurisdiction;

(e) to prescribe activities that are not routine fishing or farming activities for the purposes of certain defences to threatened species offences; and

(f) to update the species of fish that are protected under the Act.

On 1 April 2010, the Fisheries Management Legislation Further Amendment Regulation 2010 was published.

The *Aboriginal Land Rights Amendment Act* 2009 commenced on 31 March 2010 (full explanatory notes). The Department of Planning has released circular PS 10-006 on the new arrangements for landowner consent and notification requirements relating to applications under Pt 3A and Pt 4 of the *Environmental Planning and Assessment Act* 1979 when the subject land is owned by a Local Aboriginal Land council. The accompanying Aboriginal Land Rights Amendment Regulation 2010 was published on 9 April 2010.

On 29 January 2010, all uncommenced provisions in the *Heritage Amendment Act* 2009 came into effect.

Civil Procedure Amendment (Copy Fee) Regulation 2010 — published 26 March 2010. The object of this Regulation is to amend Schedule 1 (Court fees) to the Civil Procedure Regulation 2005 to clarify that one fee of $50 is payable whether one or more sealed or certified copies of a judgment, order or written opinion or reasons for the opinion of any judicial or other officer of the court, are supplied.

- Consultation Drafts

The National Parks and Wildlife Amendment Regulation 2010 Consultation Draft was tabled in the Legislative Assembly on 25 February 2010. The Regulation proposes to amend the National Parks and Wildlife Regulation 2009 by:

(a) providing for a number of matters under proposed amendments to Pt 6 (Aboriginal objects and Aboriginal places) of the Principal Act (Schedule 1), including the following:

  (i) prescribing certain codes of practice and other documents, compliance with which will constitute a defence under s 87(2) of the Principal Act against the new strict liability offence of harming an Aboriginal object (proposed cl 80A);

  (ii) creating an additional defence against that offence where the defendant establishes that the act or omission concerned occurred in the course of certain specified low impact activities, such as farming or maintenance work (proposed cl 80B);

  (iii) specifying a process of community consultation with relevant Aboriginal parties that must be undertaken before a person makes an application for an Aboriginal heritage impact permit (proposed cl 80C);

  (iv) providing that an application for an Aboriginal heritage impact permit must be accompanied by a cultural heritage assessment report and setting out what such a report is to deal with and include (proposed cl 80D);

  (v) providing that the Director-General of the Department of Environment, Climate Change and Water may require an applicant for the variation of an Aboriginal heritage impact permit to carry out such community consultation as the Director-General considers appropriate if the Director-General is satisfied that the variation will result in a significant increase in harm to the Aboriginal objects or Aboriginal places concerned (proposed cl 80E); and

  (vi) providing that certain bush fire hazard reduction work is undertaken so as not to harm Aboriginal objects or places for the purposes of the offence in s 86 of the Principal Act (proposed cl 80F); and

(b) prescribing penalty notice amounts for certain new offences to be inserted into the Principal Act (Schedule 1).

- State Environmental Planning Policy Amendments

SEPP (Major Development) Amendment (Huntlee New Town Site) 2009 — published 22 January 2010, amends SEPP (Major Developments) 2005 to remove the site from the state significant list.

SEPP (Major Development) Amendment (Southern Highlands Regional Shooting Complex) 2010 — published 22 January 2010, provides that shooting ranges are permissible with development consent in the state significant site.

SEPP (Exempt and Complying Development Codes) Amendment (Extension) 2010— published 26 February 2010, amends the Codes SEPP to extend the transitional provisions until 31 December 2010. Further information is available in Circular PS 10-004 published by the Department of Planning.

SEPP (Sydney Region Growth Centres) Amendment (Miscellaneous) 2010 — published 1 April 2010, lists amended maps for growth centres, makes some changes to definitions and zoning in, for example, the Oran Park precinct.

- Bills

The Court Information Bill 2010 was introduced into the Legislative Assembly on 17 March 2010, following on from the Court Information Bill Consultation Draft exhibited on 1 October 2009. It has not progressed further than the "Agreed to in Principle" speech on 19 March 2010 in the Legislative Assembly.

National Parks and Wildlife Amendment Bill 2010 was introduced into Parliament on 25 February 2010. It seeks to amend the *National Parks and Wildlife Act* 1974, the *Threatened Species Conservation Act* 1995 and various other Acts to make further provision with respect to the protection of Aboriginal objects and places, the protection of fauna, native plants and threatened species, and general administration and enforcement matters; and for other purposes. The proposed amendments to the regulation are the subject of a consultation draft (see above).

Coastal Protection and Other Legislation Amendment Bill 2010 Consultation draft, 26 March 2010. For further information about the draft Coastal Protection and Other Legislation Amendment Bill see the Department of Environment, Climate Change and Water website.

The Trees (Disputes Between Neighbours) Amendment Bill 2010 was introduced into the Legislative Assembly on 21 April 2010. It seeks to amend the *Trees (Disputes Between Neighbours) Act* 2006 to extend the operation of Pt 2 of that Act to trees situated on land zoned "rural-residential"; make it clear that an application for an order under Pt 2 of that Act can be made following removal of a tree that caused damage or injury on which the application is based; give the Court jurisdiction to hear disputes about high hedges (at least 2.5m high) that obstruct sunlight to a window of a dwelling or any view from a dwelling;

give the Court jurisdiction to hear and determine related matters arising under the *Dividing Fences Act* 1991; and makes amendments to provisions for enforcement of orders.

- Miscellaneous

The NSW Parliamentary Library Research Service released an E-Brief in February 2010 titled "Agriculture, Landscapes and Carbon". It reviews the contribution of the agriculture sector to Australia's greenhouse gas emissions and analyses the potential of agriculture and landscape management to sequest / mitigate greenhouse gases.

In February 2010, The Department of Planning released the 2008-09 Local Development Performance Monitoring Report, which contains statistics on development applications processed by local councils.

The Department of Planning and Better Regulation Office have released their joint report on "Promoting Economic Growth and Competition Through the Planning System". The recommendations are:

(1) to develop a Competition State Environmental Planning Policy (SEPP) to clarify that competition between individual businesses is not in itself a relevant planning consideration. In particular, the SEPP should specify that the loss of trade for an existing business is not normally a relevant planning consideration. The SEPP should also specify that a planning authority should not consider the commercial viability of a proposed development;

(2) that the SEPP should clarify that any restrictions on the number of a particular type of retail store contained in any LEP or DCP is invalid;

(3) that the Competition SEPP should specify that any proximity restriction on particular types of retail stores contained in LEPs or DCPs is invalid;

(4) that the final Activity Centres Policy should consider ways to increase opportunities for competition by allowing more types of shops into centres that currently only permit 'neighbourhood shops';

(5) that the Minister for Planning issue a direction to councils to consider applications that divert from the floorspace ratios in the DCP. These applications should include justification in a similar manner to a cl 4.6 or SEPP 1 submission. The council will then have to consider the application on its merits;

(6) that guidance is to be provided on how to consider third party objections when assessing development proposals. This guidance can be referred to by applicants, community members, determining authorities and courts. This guidance should include advice on prioritising issues to be addressed and information on recourse available to seek losses from vexatious objectors. It should also address the matters proposed in recommendation 1 of this review; and

(7) that the Minister issue a direction to councils under s 117 of the EPA Act to ensure that unless it can be justified on sound planning grounds, such as for environmental protection reasons, planning policies and instruments cannot apply retrospectively. As a general rule, only policies and instruments in place at the time of lodgement of the application should be considered when assessing a development proposal.

- Mining

On 24 April 2010, the Mining and Petroleum Amendment (Access to Land) Bill 2010 was introduced to Parliament. The object of the Bill is to amend the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 in relation to access to land by the holders of prospecting titles over the land following the decision in the

Supreme Court of NSW (*Brown v Coal Mines Australia; Alcorn v Coal Mines Australia Pty Ltd* [2010] NSWSC 143).

Judgments

High Court of Australia

- Compulsory Acquisition

Mandurah Enterprises Pty Ltd v Western Australian Planning Commission [2010] HCA 2; (2010) 171 LGERA 200 (French CJ, Gummow, Crennan and Bell JJ, Hayne J in dissent)

On appeal from the Western Australian Planning Commission.

Facts: consequent upon a compulsory acquisition under the *Land Administration Act* 1997 (WA) from the appellant, the respondent became the registered proprietor of four lots of land which were compulsorily acquired for the subsequent construction of the Perth to Mandurah railway on and adjacent to that land. However, not all the land was required for the construction of the railway. Some was acquired for the purpose of avoiding rail crossings. The purposes for which the land was taken in the acquisition order was identified as "railways" and "primary regional roads".

Issues:

(1) whether the Commission had the power to compulsorily acquire the land in these circumstances; and

(2) if it did not, could part of or the whole of a lot invalidly acquired be severed from lots validly acquired.

Held: by majority, allowing the appeal and declaring that the acquisition was invalid in part:

(1) compulsory acquisition and associated compensation is entirely the creation of statute. When power to acquire property is at issue, questions of statutory construction are to be assessed by reference to the presumption against an intention to interfere with vested property rights: at [32];

(2) the power to compulsorily acquire land is a power to take land for the purpose for which the power is granted and must be consistent with that purpose: at [33];

(3) while the acquisition was consistent with the permissible purpose of a town planning scheme: at [34], the admitted purpose of avoiding the obligation to construct a rail crossing was incapable of being acquisition for a "railway purpose" under the *Land Administration Act*: at [40];

(4) the passive holding of the land was also not for a purpose incidental to the undertaking, construction or provision of a railway: at [40]–[41];

(5) the consequence of finding that the acquisition was both valid and invalid had the consequence that the acquisition order could not operate under the relevant statutory scheme to extinguish the whole of the appellant's interest in the land. Extinguishment only applied to so much of the land as was validly acquired: at [42]; and

(6) the common law principle of severance could be applied to the compulsory acquisition of land, at least in respect of difference lots: at [48].

- Water Rights

Arnold v Minister Administering the Water Management Act 2000 [2010] HCA 3; (2010) 263 ALR 193 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J in dissent)

Appeal against decision of NSW Court of Appeal.

Facts: the appellants held groundwater extraction entitlements under the *Water Act* 1912 (the Water Act). Those entitlements were reduced by the *Water Management Act* 2000 (the Management Act) and the Water Sharing Plan for the Lower Murray Groundwater Source 2006 (the 2006 Plan). This was done in the context of a national water sustainability arrangement involving the *Natural Resources Management (Financial Assistance) Act* 1992 (Cth), the *National Water Commission Act* 2004 (Cth) and certain Commonwealth/State agreements, including a funding agreement.

The appellants challenged the validity of the 2006 Plan and the Commonwealth legislative scheme in the Land and Environment Court. The Commonwealth then successfully sought the dismissal of the proceedings against it. On appeal, the issues included whether the LEC had the jurisdiction to determine the validity of Commonwealth legislation by reason of infringement of s 51(xxxi) or s 100 of the *Constitution*. Section 100 states: "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation".

On 4 December 2008, the Court of Appeal (Spigelman CJ, Allsop P and Handley AJA) unanimously found that the LEC's jurisdiction in this case was determined by the Management Act. Their Honours held that that Act defined the extent to which the LEC was invested with federal jurisdiction pursuant to s 39(2) of the *Judiciary Act* 1903 (Cth). They also held that s 16(1A) of the *Land and Environment Court Act* 1979 conferred ancillary jurisdiction upon the LEC.

The Court of Appeal held that none of the relevant agreements or legislation offended the prohibition in s 100 of the *Constitution*. This was because that section applied only to laws made under s 51(i) of the *Constitution*. Their Honours further found that neither of the relevant Commonwealth statutes could be characterised as a law with respect to the acquisition of property. They also held that the validity (or even existence) of any Commonwealth/State agreements was irrelevant to the validity of the 2006 Plan or the Management Act. The Court further held that the allocation of a Commonwealth grant under s 96 of the *Constitution* was valid despite those funds being used by the State to acquire a property on other than just terms. This was because the State was entitled to accept Commonwealth funds on whatever basis it wished.

Issues:

(1) whether a grant made by the Commonwealth to a State on condition that the State acquire property on unjust terms is invalid and ultra vires the legislative power of the Commonwealth; and

(2) whether the *National Water Commission Act* 2004 and the 2005 Funding Agreement were laws or regulations of trade or commerce that infringed s 100 of the *Constitution*.

Held: dismissing the appeal:

(1) for the reasons given in *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 261 ALR 653; [2009] HCA 51, either no property was acquired because the licenses were not property: at [3] and [48], or there was no acquisition: at [72], and therefore, s 51(xxxi) had not been infringed; and

(2) because, first, no statute or agreement (ie the Funding Agreement) relied upon by the appellants could be characterised as a "law or regulation of trade or commerce " under s 100, and second, the rights conferred by the appellants' bore licenses related to underground water in aquifiers and the 2006 Plan applied to the Lower Murray Groundwater Source, neither of which were the "waters of rivers" within the meaning of s 100, s 100 did not apply: at [26], [29], [54] and [75].

- Jurisdictional Error

Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales [2010] HCA 1; (2010) 113 ALD 1 (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ, Heydon J in dissent on the orders)

On appeal from the New South Wales Court of Criminal Appeal.

Facts: Kirk Group Holdings Pty Ltd was the owner of a farm near Picton. Mr Kirk was the director of that company but did not take an active part in the running of the farm. He left the day to day operation of the farm to a third person who was employed by the Kirk Group as a farm manager. An all terrain vehicle was purchased by the Kirk Group in June 1998 on the farm manager's recommendation. On 28 March 2001, the farm manager used the vehicle to deliver steel fencing to contractors working on the farm. The farm manager did not use the existing road to get to the contractors, but proceeded on the vehicle down the side of a steep slope with no formed track. The vehicle overturned and the farm manager was killed.

Both the company and Mr Kirk were separately charged with offences under the *Occupational Health and Safety Act* 1983 (the Act) on the basis that they had failed to provide a safe system of work without risk to health. No proper particulars were given of the charges, especially those against Kirk Group. At first instance, the offences were dealt with in the summary jurisdiction of the Industrial Court of NSW. During the course of the prosecution Mr Kirk was called, by consent, by the prosecutor to give evidence against the company.

A privative clause in the Act (s 179) ostensibly operated to deny an appeal to the Court of Appeal and the High Court.

Issues:

(1) whether the particulars of the charges against the Kirk Group were sufficient;

(2) whether the Industrial Court erred by allowing Mr Kirk to be called as a witness for the prosecution;

(3) whether these errors were jurisdictional errors; and

(4) whether the privative clause precluded review by the Court.

Held: upholding the appeal:

(1) the particulars were insufficient and consequently the Kirk Group was denied the opportunity of properly putting on a defence: at [38];

(2) because the rules of evidence applied to the Industrial Court, s 17(2) of the *Evidence Act* 1995, which could not be waived, provided that a defendant is not competent to give evidence as a witness for the prosecution. The Industrial Court therefore erred in permitting Mr Kirk to be called as a witness by the prosecutor: at [51];

(3) the errors above were jurisdictional errors: at [55]. The Court discussed the concept of jurisdictional error generally and as it applied to the proceedings: at [60]-[90]; and

(4) a privative clause in State legislation which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the grounds of jurisdictional error is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State pursuant to Ch III of the Constitution: at [55] and [91]-[108].

NSW Court of Appeal

- Administrative Law

Sharples v Minister for Local Government [2010] NSWCA 36 (Beazley, Tobias and McColl JJA)

First instance LEC decisions: *Sharples v Minister for Local Government* [2008] NSWLEC 308*; Sharples v Minister for Local Government* [2008] NSWLEC 328 (2008) 166 LGERA 302; *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62 (Biscoe J)

Facts: the Minister for Local Government made two determinations in 2006 and 2007 (the Determinations) pursuant to s 508A(1) of the *Local Government Act* 1993 (the LG Act) to increase the general income of Tweed Shire Council. Mr Terry Sharples (a council ratepayer) sought a declaration that the Determinations were void and of no effect upon the grounds that, first, the Council misleadingly understated to the community the effect of the proposed rate increase in the council newspaper (misleading the public), and second, the Council misleadingly overstated the extent of community support or understated the extent of community opposition in paper and telephone surveys (misleading the Minister).

The Minister was required to make the determinations in accordance "with any applicable guidelines" (s 508A the LG Act).

The applicable guidelines referred to in s 508A(3) of the LG Act provided that applications under s 50 of the LG Act should be made by way of a written submission covering "the minimum requirements" including, *inter alia*, "evidence of community support for the proposal and how the community was consulted (eg, use of meetings, surveys, etc)" (the Guidelines).

The appellant appealed against four decisions of the primary judge: first, the refusal to permit the appellant to further amend his points of claim on the fifth day of the hearing; second, the rejection of an application to read an affidavit that had been served on the third day of the hearing; third, the dismissal of the substantive proceedings, and fourth, the decision that the appellant pay one third of the Council's costs of the proceedings.

Issues:

(1) whether the primary judge erred in finding that the proposed amendment to the appellant's points of claim raised a new issue and that the Council would be prejudiced or that there would be a prejudice to the administration of the Court's list;

(2) whether the late service of the affidavit deprived the Council of the opportunity to ascertain the whereabouts of the person who conducted the survey, an opportunity it would have had had the affidavit been filed in accordance with the directions for the filing of evidence;

(3) whether the primary judge erred in failing to take into account the fact that the prejudice would be mitigated as the proceedings were to be adjourned in any event for several weeks;

(4) whether the primary judge erred in not declaring the Determinations invalid having found there was a breach of s 508A(3) of the LG Act;

(5) whether it was the purpose of the legislation that a determination made in respect of a "guidelines discordant application" should be invalid;

(6) whether the primary judge erred in dealing differentially with the Determinations and the misrepresentations; and

(7) whether the primary judge erred in dividing the case for the purposes of assessing costs into two independent limbs - the first limb in respect of the Determinations, and the second, in respect of misleading the public and the Minister - and then asking whether the usual order for costs in favour of the successful party should be departed.

Held: dismissing the appeal:

(1) ss 57 and ss 57 of the *Civil Procedure Act* 2005 required that in deciding whether to make an order for the amendment of a document the Court should "seek to act in accordance with the dictates of justice" and have regard to "the efficient disposal of the business of the court", "the efficient use of available judicial and administrative resources" and "the timely disposal of the proceedings ... at a cost affordable by the respective parties": at [21]. The primary judge accepted that if the amendment was to be allowed, the respondents would be prejudiced due to the lateness in seeking it. Had it been sought in a timely

way, it was likely that the Council would have called additional evidence and conducted its cross-examination differently. If the amendment was to be allowed, the respondents would need to be afforded the opportunity to call further evidence and to recall two expert witnesses for further questioning: at [14]. The primary judge therefore found that there was prejudice and considered that allowing the amendment would disrupt and extend the hearing of the case and thus adversely affect its timely disposal. The problem would not have been alleviated by the fact that it was necessary to adjourn the proceedings for some weeks for the purpose of hearing submissions: at [23];

(2) although his Honour did not expressly take into account the fact that the hearing was to be adjourned for the purpose of submissions, the late service of the affidavit deprived the Council of the opportunity to ascertain the whereabouts of the person who conducted the survey, an opportunity it would have had had the affidavit been filed in accordance with the directions for the filing of evidence: at [32];

(3) the requirement implicit in the Guidelines for community consultation was not one intended by the legislature to be critical to the Minister's decision to approve an application or that it was a matter central to the statutory scheme. In this respect, the statute did not mandate the content of the Guidelines to be issued by the Director-General for the purpose of the making of an application pursuant to s 508A. Their content was left to the discretion of the Director-General: at [93(d)];

(4) although there was a requirement for public consultation, the method and the nature of that consultation was entirely left to the council concerned: at [93(g)];

(5) the present case was distinguishable from the legislative provisions specifically requiring public consultation which could only effectively occur in the event that there was compliance with the statutory mandate that an application be accompanied by a relevant impact statement: at [93(i)];

(6) ss 508A(8) and (9)(b) of the LG Act evinced a clear intention that contravention by a council of any applicable Guideline was not intended to result in invalidity of the determination but only to empower the Minister to revoke or vary the determination. If the Minister became aware of any such contravention before he made a determination, he was empowered by s 508A(1) to refuse to make the determination: at [93(l)];

(7) the challenge to the dismissal of the appellant's claims of misleading the public and misleading the Minister could only succeed if it was established that the Minister failed to take into account a relevant consideration, namely, that the survey results as notified to him by the Council were misleading in the respects alleged by the appellant: at [109];

(8) r 4.2(1) of the Land and Environment Court Rules 2007 (the Rules) was engaged as the proceedings had been brought in the public interest. The question of public interest applied to the proceedings as a whole rather than to particular issues in the proceedings: at [123(a)];

(9) proceedings to which Pt 4 of the Rules apply are also subject to the provisions of the Uniform Civil Procedure Rules 2005 (the UCPR). Rule 42.1 of the UCPR, which is the general rule that costs follow the event, enables the court to make "some other order ... as to the whole or any part of· the costs". Rule 4.2(1) prevails over r 42.1 "to the extent only of any inconsistency": s 11 of the *Civil Procedure Act* 2005 and UCPR 1.7: at [123(a)]; and

(10) r 42.1 of the UCPR entitled the Court to make a different order as to costs where there were multiple issues involved in the proceedings and thus justified the primary judge dealing differentially with each limb of the appellant's case when it came to a determination of whether the discretion not to order costs should be exercised in whole or in part: at [124].

- Construction of Environmental Planning Instruments

Homeworld Ballina Pty Ltd v Ballina Shire Council [2010] NSWCA 65 (Basten, Macfarlan and Young JJA)

First instance LEC decision: *Homeworld Ballina Pty Ltd v Ballina Shire Council*; [2009] NSWLEC 172 (Sheahan J)

Facts: Amendment No 95 to the Ballina Local Environment Plan 1987 (the LEP) was made by the Minister for Planning on 20 July 2007. The amendment rezoned particular council land in part as "Industrial Zone" and in part as "Environmental Protection (Wetlands) Zone", so as to enable the land to be used for industrial purposes or environmental protection.

The draft plan had been publicly exhibited in 2004-2005 pursuant to s 66 of the *Environmental Planning and Assessment Act* 1979 (the EPA Act). The council challenged the validity of the amendments because the purpose of the amendments was described as enabling the land to be used for industrial purposes and environmental protection. No reference was made to the fact that part of the purpose was to permit the land to be used for retailing bulky goods.

Issues:

(1) whether a reasonable reader would have been misled into thinking that the amendments permitting rezoning for "industrial purposes" did not include the possibility of "bulky goods retailing"; and

(2) the meaning of the terms "bulky goods retailing", "industrial purposes", "public exhibition" and "reasonable reader".

Held: dismissing the appeal:

(1) s 66 of the EPA Act requires LEPs to be publicly exhibited. A plan may be invalid if the material presented with the LEP would mislead a reasonable reader;

(2) unless the council was manifestly unreasonable in failing to exhibit any required accompanying explanatory material, the public exhibition of a document cannot be invalid because the document is misleading in itself: at [36]-[37];

(3) the test of what is "misleading" will be different with respect to the required notification as there is no requirement under s 66(1)(a) of the EPA Act for any explanation to be provided with the notification: at [29]-[32];

(4) the draft LEP and draft DCP on exhibition clearly identified that bulky goods retail outlets would be permissible with consent on the land to be zoned industrial;

(5) the test of a reasonable reader is not a person who has no knowledge of planning law. "The test of what is misleading depends upon the understanding that would be obtained by a reasonable reader." The reasonable reader is assumed to be able to understand the inter-relationship of various documents on public exhibition. Where the LEP being amended is one of those documents, a reasonable reader is expected to have looked at the parts of the documents relevant to their concern. *Gales Holdings Pty Ltd v Minister for Infrastructure and Planning* [2006] NSWCA 388; 69 NSWLR 56 applied: at [21]-[26] and [47]-[50];

(6) "there is at least a risk that too strict a test will discourage councils from providing helpful information as to what is being placed on exhibition, because by doing more than statute requires, they will risk invalidating the process.": at [28]; and

(7) the appellant sought to constrict the meaning of "industrial" to manufacturing industries only. The Macquarie Dictionary indicates that this is not the ordinary meaning of the word: at [38-39].

Kayora Pty Ltd v Leichhardt Council [2010] NSWCA 35 (Tobias and Campbell JJA, Sackville AJA)

First instance LEC decision: *Kayora Pty Ltd v Leichhardt Council* [2009] NSWLEC 126 (Biscoe J)

Facts: the appellants, Kayora Pty Ltd and North Annandale Hotel Pty Ltd, were the owners and operators of premises known as the North Annandale Hotel (the Hotel). The appellants sought a declaration that they were entitled to use the yard area described as the "proposed beer garden" on the plan dated 2 September 1953 for the purpose of a hotel, including as a beer garden.

The *County of Cumberland Planning Scheme Ordinance* (the Ordinance) came into effect on 27 June 1951. It had zoned the premises as a "Living Area". The Hotel had existed prior to the commencement of the

Ordinance. The previous owners of the premises had made an application on 9 September 1953 to the Licensing Court to make material alterations to the premises for the use of the yard as a beer garden. This was approved and the work was carried out. On 27 November 1953, an application was made to the Council pursuant to cl 34(1) of the Ordinance for the retention of the existing building on the land, for the continuance of the existing use of the premises as a hotel and for the rebuilding, alteration, enlargement, extension, or addition by erection, of the existing buildings upon the land. Consent was granted for continuance of the existing use of the building as a hotel on 27 November 1953. The letter granting consent stated, "the Council has now granted the necessary permission" (the 1953 consent).

Biscoe J dismissed the application on the basis that the existing use of the premises as at the date of the Ordinance in 1951 was as a hotel in two distinct parts. The rear yard, bedrooms and bathrooms where no alcohol was sold and the rest. In construing the 1953 consent, this fact had to be taken into account. Accordingly, the yard could not be used as a beer garden.

Issues:

(1) whether the yard formed part of the licensed premises; and

(2) whether there was an existing use of the yard as a beer garden on the basis of the consent granted by Council on 27 November 1953 and the approval given by the Licensing Magistrate on 9 September 1953.

Held: allowing the appeal:

(1) a publican's license existed as at the date of commencement of the Ordinance. The whole of the hotel land, including the yard, was the subject of that licence as at that date: at [24] and [38];

(2) in accordance with the *Liquor Act* 1912, the owner or licensee of licensed premises was required to apply to the Licensing Court in order to make any material alteration or addition to the premises: at [27]. This had been done and permission had been granted, such permission extending to the yard because it formed part of the licensed premises: at [30]-[33]; and

(3) the Council had consented to the retention of the use of the hotel building and the hotel land "as hotel premises" in its letter dated 27 November 1953 (at [46] and [54]). The consent was to be construed as permitting the rear yard shown on the plan, including its use as a beer garden: at [58]. The consent, however, did not authorise the erection of buildings, and therefore, if the appellants wanted to engage in such works they needed to obtain development consent in accordance with the *Environmental Planning and Assessment Act* 1979: at [59].

Agostino v Penrith City Council [2010] NSWCA 20 (Giles and Tobias JJA; McClellan CJ at CL in dissent)

First instance LEC decision: *Agostino v Penrith City Council* [2009] NSWLEC 76 (Pain J)

Facts: the appellants, who operated a fruit and vegetable shop, lodged a development application with Penrith City Council for alterations and additions to the shop. They wanted to increase the shop's floor space from 150 sqm to 765 sqm. The council refused the application.

The appellants lodged a class one appeal in the LEC. A preliminary point of law was heard by Pain J. The issue was whether cl 41(3) of the Penrith Local Environmental Plan No 201 (the LEP), which applied solely to the shop, was a development standard or a prohibition. The clause provided:

> Notwithstanding any other provision of this plan, a person may, with the consent of council, carry out development on land to which this clause applies for the purposes of a fruit and vegetable shop with a maximum floor area of 150 sq m.

Pain J held that the clause was a prohibition and dismissed the appeal.

Issues:

(1) because the appeal was from a preliminary point of law, leave to appeal was required (s 57(4)(d) of the *Land and Environment Court Act* 1979). The appellants were late lodging the appeal, so a preliminary issue arose as to whether they should be granted an extension of time to lodge the appeal; and

(2) whether cl 41(3) prohibited development of a fruit and vegetable shop with a floor space greater than 150 sqm.

Held: granting leave to appeal and dismissing the appeal:

(1) the appellants had changed solicitors and there was delay by the original solicitors forwarding the file. As the council had notice that the appellants were to lodge the appeal, they were not prejudiced by the delay: at [8]-[11];

(2) as the council did not oppose leave to appeal if the extension of time was granted, leave to appeal was granted. In any event the appellant's case was sufficiently arguable to justify a grant of leave: at [12];

(3) the first step was to identify the proposed development and determine whether it fell within cl 41(3) and if so it was permissible development with consent. It was therefore necessary to identify which criteria were essential conditions when determining if the proposed development was permissible. In doing so the LEP was to be considered as a whole. Care must be taken to ensure that form does not govern substance: at [46]; and

(4) the permissible development for the site was for "a fruit and vegetable store with a maximum floor area of 150 sqm". The floor area was not a separately identified control imposed on an aspect of the permissible development. It was an essential criterion of what was permissible. Therefore, the proposed development was prohibited: at [47].

- Costs

Hastings Point Progress Association Inc v Tweed Shire Council (No 3) [2010] NSWCA 39 (McColl, Basten and Young JJA)

First instance LEC decision: *Hastings Point Progress Association Inc v Tweed Shire Council* [2008] NSWLEC 180 (Pain J)

Facts: Hastings Point Progress Association Inc (HPPA) was a community group incorporated under the *Associations Incorporation Act* 1984. HPPA unsuccessfully brought proceedings against Tweed Shire Council challenging whether the applicable planning rules permitted the Council to approve a development greater than two storeys in height pursuant to s 123 of the *Environmental Planning and Assessment Act* 1979. When judgment was delivered in the appeal ([2009] NSWCA 285) the Court of Appeal ordered the appellant to pay the respondent's costs of the appeal (the appellant was unsuccessful at first instance and on appeal). The appellant protested that the Court had not heard it on the issue of costs. The Court agreed and reopened the matter.

Issues:

(1) whether the litigation brought by HPPA was public interest litigation that warranted departure from the ordinary rule that costs follow the event.

Held: dismissing the appeal and ordering the appellant to pay costs:

(1) though the Land and Environment Court Rules 2007 (LEC Rules) no longer contained a specific provision with respect to costs, r 4.2 of the LEC Rules allowed that Court not to make an order for the payment of costs against an unsuccessful party if it was satisfied that the proceedings were brought in the public interest: at [5];

(2) r 4.2 did not apply to courts other than the Land and Environment Court. It therefore did not apply to the Court of Appeal except insofar as it gave flavour to the pre-existing guidelines as to exercise of discretion: at [19]. Instead, the applicable rule was Pt 42(1) of the Uniform Civil Procedure Rules 2005, which stated that costs follow the event "unless it appears to the Court that some other order should be made": at [17];

(3) the circumstance and purpose of the litigation were relevant to the exercise of the Court's discretion and did not constitute extraneous circumstances. The relevant factors in this matter were, first, that the

defendant was a commercial enterprise and not the State or a government authority. Second, the question of public interest was not one having broad ramifications for the community at large. And third, the matter was not entirely without consequence for the private interests of members of the HPPA. In these circumstances, the Court was entitled to look behind the legal structure of the HPPA to identify whose interests, both legal and financial were affected in a practical sense: at [11]; and

(4) a person seeking to displace the prima facie effect of a costs order must show that there is something out of the ordinary in order to justify departure from the normal costs order (*State of New South Wales v Gebethner* [2009] NSWCA 237). The appellant had to show that there was "something more" than the mere fact of public interest litigation to warrant departure from the ordinary rule that costs follow the event: at [18]. This HPPA had not done: at [47].

Supreme Court of New South Wales

- Mining

Brown v Coal Mines Australia Pty Ltd; Alcorn & Anor v Coal Mines Australia Pty Ltd [2010] NSWSC 143 (Schmidt J)

Related decision: *Alcorn v Coal Mines Australia Pty Ltd* (unreported, Mining Warden, 21 May 2009)

Facts: the plaintiffs own farming land in the Liverpool Plains near Gunnedah and that land was mortgaged. The defendant mining company held a five-year exploration licence to carry out prospecting operations on the plaintiffs' land. Relevantly, a condition of the licence precluded the defendant from carrying out prospecting operations on the plaintiffs' land otherwise than in accordance with an access arrangement. Unable to come to an agreement with the plaintiffs about the terms of an access arrangement, the defendant pursued access to the properties under the *Mining Act* 1992, by arbitration. The defendant gave notice of this, as required under s 142 of the Act to the plaintiffs as "landholders", but it did not give notice to the mortgagees. The arbitrator determined an access agreement. In proceedings before the Mining Warden pursuant to s 155 of the *Mining Act* for review of the arbitrator's determination, it was accepted that the failure to serve notice on any mortgagees was a breach of s 142 of the *Mining Act*. The Mining Warden held that this failure did not deprive the Court of jurisdiction to determine the conditions on which access to the land would be granted.

Issues:

(1) whether a mortgagee is a "landholder" as defined in s 8 of the *Mining Act*, and if so, whether the failure to notify such a landholder deprived the Mining Warden's Court of jurisdiction to determine the review; and

(2) whether an exploration licence holder can enter into more than one access agreement in respect of land the subject of an exploration licence.

Held: quashing the decision of the Mining Warden as well as the determination which accompanied it and the interim and final determinations of the arbitrator:

(1) the *Mining Act* contemplates only one access arrangement as between the holder of an exploration licence and all landholders: at [89];

(2) a " landholder" under the *Mining Act* includes a mortgagee and the failure to notify such a landholder of the defendant's application for access to the plaintiffs' land meant that the Warden's Court had no jurisdiction to entertain the review proceedings: at [104]; and

(3) there must be reasons sufficient to provide an explanation for the conclusions reached in an arbitration in respect of an access arrangement and in review proceedings before the Mining Warden: at [128].

Land and Environment Court of NSW

Judicial Decisions

- Easements

Rainbowforce Pty Limited v Skyton Holdings Pty Limited [2010] NSWLEC 2; (2010) 171 LGERA 286 (Preston CJ)

Facts: the Hills Shire Council (the Council) granted development consent subject to conditions to Rainbowforce Pty Limited (Rainbowforce) for a high-density residential development. The development consent included a condition that it was not to operate until Rainbowforce satisfied the Council that a right of carriageway had been created over adjoining land variously owned by Skyton Holdings Pty Limited and others (referred to collectively as Skyton). Rainbowforce made numerous unsuccessful attempts to obtain the required right of carriageway from Skyton. By consent, the Land and Environment Court upheld an appeal against Council's refusal to modify the development consent and modified the development consent previously granted by the Council.

Rainbowforce brought proceedings for an order under s 40(2) of the *Land and Environment Court Act* 1979 imposing a right of carriageway over the land owned by Skyton. In dealing with such an application, the Court exercised the jurisdiction of the Supreme Court under s 88K of the *Conveyancing Act* 1919.

Issues:

(1) whether the easement was reasonably necessary for the effective development and subsequent use of the Rainbowforce land that will have the benefit of the easement: s 88K *Conveyancing Act*;

(2) whether the use of the land having the benefit of the easement would be inconsistent with the public interest: s 88K(2)(a) *Conveyancing Act*;

(3) whether Skyton could be adequately compensated for any loss or other disadvantage that would arise from imposition of the easement: s 88K(2)(b) *Conveyancing Act*. Skyton submitted that they could not be adequately compensated on the following grounds:

   (a) the construction and subsequent use of the access road in the easement would impair the amenity of Skyton land in such a manner that injury to intangible benefits and imposition of intangible detriments which were not able to be adequately compensated would result;

   (b) there was a financial risk to Skyton under the development consent if Rainbowforce did not complete or was delayed in completing construction of the easement and as a result Skyton was unable to obtain an occupation certificate for the completed development; and

   (c) Rainbowforce did not provide a noise assessment report detailing the noise impacts of the use of the access road resulting in uncertainty as to whether Skyton would be able to comply with the noise criteria in their development consent. If Skyton was unable to comply, it would suffer loss for which it would not be compensated;

(4) whether the 'piecemeal' or 'before and after' approach was more appropriate in calculating the quantum of compensation for losses resulting from the imposition of the easement.

Held: granting the application for an easement:

(1) the creation of an easement was reasonably necessary for the effective development and subsequent use of the Rainbowforce land: at [84]. The creation of the proposed easement was a deferred commencement condition of the development consent granted to Rainbowforce by the Council and the planning controls applying to the land required the creation of an easement for all reasonable uses or developments of the land. The availability of alternative routes for the easement did not cause the

proposed easement over the Skyton Land to not be reasonably necessary for the effective use and development of the Rainbowforce land: at [90] and [92];

(2) there was nothing in the proposal or use of the land that was inconsistent with the public interest: at [94]-[96]. The proposed development and subsequent use of the Rainbowforce land was a permitted purpose under the relevant environmental planning instrument and in accordance with the development consent. It was consistent with the outcomes of strategic and site specific planning for the area which resulted in the land being identified as suitable for medium to high density residential development, the rezoning of each site for this purpose and the preparation of site specific Development Control Plans. The Council's position was clear and unchanging: access to the Rainbowforce land was only to be provided over the Skyton land and the Council may not be prepared to approve any other access. If an easement was not granted, the development and use of the Rainbowforce land may not be able to occur and the land would be virtually sterilised. This would not be in the public interest: at [97];

(3) Skyton could be adequately compensated:

(a) the impacts of the use of a right of way were largely physical impacts rather than intangible ones and could therefore be valued and adequately compensated: at [121]. The amenity impacts of the easement were repeatedly addressed by the Council and the Court and would be minimised by the proposed terms of the easement and considered by the Council when assessing the development application for the construction of the easement: at [118]-[120];

(b) the imposition of an easement in the terms proposed was unlikely to prevent an occupation certificate being issued for a completed development on the Skyton land. The timeframe for Skyton to carry out and complete its development in accordance with its development consent was likely to be considerably longer than the time required to complete construction on the easement. If there was residual risk, it could be dealt with by reserving liberty to Skyton to apply for further compensation for a future loss arising from the imposition of the easement: at [102]-[103] and [122]; and

(c) the use of the access road would not cause Skyton to be in breach of the noise conditions contained in the development consent. The Council imposed the conditions with full knowledge that an easement would be required to access the Rainbowforce land. It was reasonable to infer that the Council was satisfied that the performance standards relating to noise would be able to be met with the right of carriageway being used as intended: at [123]. In any case, there would be an additional opportunity to address the noise impacts by the use of the access road in the easement when the Council considered and determined Rainbowforce's development application to construct the access road: at [124];

(4) the 'piecemeal' approach was the most appropriate valuation method in the circumstances of the case and would yield a more reliable valuation figure than the 'before and after' approach: at [141]; and

(5) consideration and comprehensive survey of authority in relation to the granting of easements under s 88K of the *Conveyancing Act* 1919 and s 40 of the Land and *Environment Court Act* 1979.

- Existing Use Rights

MM & SW Enterprises Pty Ltd v Strathfield Council [2010] NSWLEC 8 (Pepper J)

Facts: since 2003 MM & SW Enterprises Pty Ltd had operated a brothel on premises located at 131A Parramatta Road, Homebush. On the 6 November 2008, Strathfield Council served MM & SW with a Brothel Closure Order pursuant to s 121B of the *Environmental Planning and Assessment Act* 1979. MM & SW sought a declaration that the premises had the benefit of existing use rights for the purpose of using the premises as a brothel. MM & SW Enterprises had purchased the premises in 2003. There was evidence that the premises had been used as a brothel intermittently from the mid 1980's. The premises had consent for use as "commercial offices" since 12 August 1980. The *Strathfield Planning Scheme Ordinance 1969* was amended by *Strathfield Local Environmental Plan 82*, gazetted on 21 November 1997. The Plan zoned the

premises Special Use 3(b) zone which prohibited use of the premises as a brothel. The applicant sought a declaration that the premises had the benefit of existing use rights for the purpose of use as a brothel.

Issues:

(1) whether or not there were existing use rights that protected the use of the premises as a brothel; and

(2) whether or not the term "commercial offices" included the premises being used as a business for the supply of sexual services.

Held: dismissing the application:

(1) to establish existing use rights the applicant had to demonstrate that the use of the premises as a brothel was lawful immediately before the amendments came into force and that the premises had continued this use since that time: at [6];

(2) the construction of the consent for the use of the premises as "commercial offices" did not extend to use as a brothel, especially taking into consideration other clauses of the consent relating to hours of operation and specific exclusions: at [92]-[94]. A brothel is a "commercial" business inasmuch as it provides a service for reward and may require rooms to assist in the administration of that business: at [98]. However to construe the use of rooms for provision of sexual services for reward as "commercial offices" would be to strain the ordinary meaning given to that term far in excess of what is "a fair but liberal reading of the rights it confers" and far in excess of "common sense": at [103];

(3) use of the premises as a brothel was not use for a lawful purpose immediately before the amendments came into effect, because the consent granted for use of the premises was for use as "commercial offices", which did not include use as a sex on premises business: at [107]; and

(4) therefore the premises did not have existing use rights to operate as a brothel: at [107].

- Judicial Review

Vis Visitor Investment Services Pty Ltd v Hawkesbury City Council [2010] NSWLEC 10 (Sheahan J)

Facts: the applicant sought a declaration that its operation of a "caravan park", on land (Lot 1 of DP 862897) alongside the Hawkesbury River, was lawful. The use of the land as a "caravan park" or tourist recreation area appeared to have commenced in or about 1967 with the applicant operating the park from 1992. The second respondent, Hawkesbury Riverside Retreat Ltd, now owned the land and filed a submitting appearance.

Earlier class two proceedings concerning the land were heard by Tuor C (see [2007] NSWLEC 112) and a subsequent s 56A appeal heard by Biscoe J (see [2008] NSWLEC 39). Those proceedings concerned Council's refusal of an application under s 68 of the *Local Government Act* 1993 for the installation of a moveable dwelling and associated structure – caravan parks requiring both development consent and s 68 approval. Biscoe J remitted the matter to the Commissioner, but the applicant discontinued those proceedings prior to the rehearing and proceeded to resolve permissibility issues by obtaining declaratory relief in class four proceedings.

Due to the change in the relevant consent authority from Colo Shire Council to Hawkesbury City Council in the late 1970s or early 1980s, and the subsequent lapse of time, documents relating to consents issued to the subject land were incomplete. Some documents tendered were also illegible due to being copied or scanned over the years.

The applicant relied upon, in particular, a development consent granted on either 20 or 22 December 2000 (M619/00) that gave consent to a "site 68". The applicant submitted that the conditions of the consent incorporated associated documents such as an accompanying 'existing plan' and the statement of environmental effects. Those associated documents, which identify site 68, were submitted to have given consent to the lawful use.

M619/00 was one of several consents granted to the applicant to use particular sites as part of a caravan or tourist recreation operation since about 1967. Some portions of land that had been granted consent had been amalgamated into other parcels which now formed parts of other lands not subject to the proceedings.

The Council contended that the application under M619/00 only sought additional sites and site 68 (nor the entirety of the land) was not approved under that DA or others before it.

The applicant did not rely on estoppel or existing use rights, despite the assumption by both parties at various times in dealing with development applications that the property had appropriate development consent to operate a caravan park.

Issues:

(1) whether a valid development consent to operate a caravan park exists on Lot 1 in DP 862897 (the parcel in its entirety) based on the construction of any of the consents issued to various sites within the land and/or on adjacent areas of land.

Held: dismissing the application:

(1) based on the available evidence the applicant did not discharge the onus of proof in seeking the declaration and so could not show that the subject allotment (Lot 1 of DP 862897) enjoyed development consent for use of the land as a caravan park: at [4] and [215]-[225]; and

(2) various consents referred to by the applicant (including M619/00) nominated particular sites for a caravan park operation and those approvals did not extend to the whole park (the consents being site specific in character): at [215]-[224].

Calardu Penrith Pty Ltd v Penrith City Council [2010] NSWLEC 50 (Biscoe J)

Facts: Calardu Penrith Pty Ltd brought proceedings challenging the validity of a development consent granted by the first respondent, Penrith City Council, to the second respondent, Pipven Pty Ltd, for "alterations and additions" to an existing Bulky Goods Retail Centre.

Issues:

(1) whether the council acted ultra vires in determining the development application because under cll 13B and 13F of State Environmental Planning Policy (Major Development) 2005 power to do so was vested solely in a regional planning panel by reason of the capital investment value of the development being more than $10 million;

(2) whether the council failed to take into account Calardu's submission as to the economic impact of the development as required by s 79C(1)(d) of the EPA Act;

(3) whether the council failed to take into account the impact of the development upon a shared parking arrangement as required by s 79C(1)(b) of the EPA Act;

(4) whether the council failed to form the opinion required by paragraph (b) of the definition of "bulky goods" in the Penrith LEP;

(5) whether the council's decision was infected by apprehended bias in circumstances where the council failed to respond to questions Calardu raised about a meeting that occurred between representatives of the council and Pipven and where the council excluded Calardu's quantity surveyor from a meeting; and

(6) whether the council failed to accord Calardu procedural fairness by failing to provide it with the opportunity to comment upon amended plans lodged by Pipven after the close of the objection period.

Held: dismissing the application:

(1) whether the capital investment value of a development exceeds $10 million was a jurisdictional fact: at [56]. In this case it was not proven that capital investment value of the development exceeded $10 million and thus it was the function of the council and not a regional planning panel to determine the DA: at [93];

(2) a council report summarised the various submissions received, including the submission put on behalf of Calardu. Having regard to this, Calardu did not discharge its onus of proving that the council failed to take into consideration its submission: at [114];

(3) the council had abundant material before it concerning the shared parking arrangement. When regard is had to this material, Calardu's submission that council failed to consider this matter could not succeed: at [124];

(4) it could be inferred from the material in a council report that the council officers did form the opinion required by paragraph (b) of the definition of "bulky goods" in the Penrith LEP: at [132];

(5) no apprehended bias was found. There was no evidence to suggest that in a meeting between the council and Pipven a deal was struck that if a DA was lodged it would be rubber stamped: at [155]. It was normal for proponents and councils to meet in the context of considering DAs. It is insufficient to support an apprehended bias claim that a quantity surveyor or an objector was not included in such meetings: at [158]; and

(6) Calardu was not denied procedural fairness. The amended plans were not adverse to Calardu. Indeed, they constructively addressed the very matters raised in Calardu's submission to the council: at [179].

Nambucca Valley Conservation Association v Nambucca Shire Council [2010] NSWLEC 38 (Biscoe J)

Facts: Nambucca Valley Conservation Association Inc brought proceedings challenging the validity of a development consent for a seven lot subdivision granted by Nambucca Shire Council. The DA was advertised once in 2003 and then amended three times before consent was finally granted in 2008.

Issues:

(1) whether the DA was refused when a council officer signed a refusal notice and informed the proponent but did not send the notice.;

(2) whether the development consent was invalid because the council did not have before it a species impact statement (SIS) as required by s 78A(8)(b) of the EPA Act;

(3) whether the development consent was invalid because the council did not have before it an environmental management plan (EMP) as required by the DG of the Department of Planning when giving conditional approval pursuant to cl 13(2) of the Koala SEPP;

(4) whether the council failed to consider cll 11 and 13 of the Nambucca LEP and public submissions;

(5) whether the council impermissibly deferred for later consideration an important matter of environmental assessment - the size and placement of building envelopes; and

(6) whether the DA was properly advertised as required by s 79A of the EPA Act.

Held: upholding grounds four and six:

(1) there was no effective determination of a development application until the prescribed statutory notice of determination was sent to the proponent: at [57]. In any case, the council officer who signed the refusal notice did not have authority to determine development applications: at [71];

(2) a SIS was not required. The loss of 400 sqm of an endangered ecological community was not a significant area of known habitat in light of the community's regional distribution: at [125]. Additionally, the development's proposed ameliorative measures were sufficient to ensure the koala was not placed at risk of extinction: at [140]-[142];

(3) the Director-General's conditional approval permitted the council to impose a condition of consent for the EMP. It did not require the EMP to be approved by the council before the council granted consent: at [151];

(4) a council report about the proposed development did not refer to cl 13 of the Nambucca LEP and gave only a "fleeting reference" to cl 11 and omitted some submissions. In these circumstances the council failed to consider these mandatory relevant considerations: at [180], [182] and [191];

(5) the development consent imposed conditions in relation to building envelopes. The council had the power to impose these conditions under s 80A of the EPA Act: at [193]-[195]; and

(6) the Nambucca DCP identified the subject type of development as advertised development: at [228]. Therefore, s 79A of the EPA Act applied and required advertising in accordance with the EPA regulation and the DCP: at [230]. Clause 90 of the EPA regulation empowered the council to dispense with advertising the amended DA if it was of the opinion that it differed only in minor respects from the original application. Email correspondence between council officers provided evidence that the council did not form that opinion: at [238]. Thus the DA should have been re-advertised.

- Threatened Species

Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council and Stoneco Pty Ltd [2010] NSWLEC 48 (Preston CJ and Adam AC)

Facts: the first respondent, Upper Hunter Shire Council ('the Council'), granted development consent to the second respondent, Stoneco Pty Ltd ('Stoneco') to establish a limestone quarry at Timor Creek, in the Isis River Valley. The applicant, Newcastle and Hunter Valley Speleological Society Inc (NHVSS), lodged an objection to the grant of consent during the exhibition period. Following the grant of consent, NHVSS appealed to this Court under s 98(1) of the *Environmental Planning and Assessment Act* 1979.

Issues: there were three broad sets of issues raised in the appeal by NHVSS:

(1) surface ecology issues:

(a) whether the vegetation over the whole of the project site comprised the endangered ecological community ('EEC') of the White Box Yellow Box Blakely's Red Gum Woodland ('the White Box EEC') and the habitat of the threatened species *Petaurus norfolcensis* ('Squirrel Glider'); and

(b) whether the proposal was likely to have a significant effect on the White Box EEC and the Squirrel Glider so as to require a species impact statement ('SIS') to accompany the development application by reason of s 78A(8)(b) of the *Environmental Planning and Assessment Act* 1979.

(2) impacts on caves, other karst features and cave dwelling fauna:

(a) whether the limestone on the Project Site was likely to contain caves and other karst features; and

(b) whether the proposal was likely to cause serious or irreversible damage to these karst features and fauna.

(3) other issues raised by resident objectors:

(a) whether the proposal was consistent with the current zoning of the site and compatible with other land uses; and

(b) whether the conditions of consent could adequately address concerns relating to the provision of adequate road infrastructure and natural resource management requirements.

Held: upholding the appeal and granting consent:

(1) surface ecology issues:

(a) the vegetation on the Project Site comprised the White Box EEC and the habitat of the Squirrel Glider: at [78] and [119]-[121];

(b) in assessing whether there was likely to be a significant affect on the White Box EEC in this case, only three of the factors in the seven-part test in s 5A(2) of the *EPA Act* 1979 were applicable: ss 5A(2)(c), 5A(2)(d), and 5A(2)(g): at [87];

(c) the current formulation of s 5A(2)(c) differed materially to the previous formulation of the section (s 5A(c)) and the evaluative conclusions reached in cases considering the former section may not assist in making the evaluative judgment required under the current section: at [90], [100] – [101]. Section 5A(2)(c) required evaluation of the likelihood of removal or modification of an area of an EEC placing a "local occurrence" of the EEC at risk of extinction. The local occurrence of the White Box EEC included the whole of the 60 ha Project Site, however only 6 ha of vegetation would be cleared within that area. Hence the Court must evaluate whether the clearing of 6 ha within the 60 ha local occurrence of the White Box EEC was likely to place the whole of that local occurrence at risk of extinction: at [98];

(d) a mere quantitative comparison of the EEC to be removed or modified with the area of the local occurrence of the EEC, may not be sufficient by itself to evaluate the likelihood of removal or modification of the area of the EEC placing the local occurrence of the EEC at risk of extinction: at [104]. Other factors may need to be considered and a qualitative analysis undertaken;

(e) the proposed action would not result in the Project Site becoming fragmented or isolated from other areas of the White Box EEC habitat for the purposes of s 5A(2)(d). There was no evidence to suggest that the 6 ha "hole" in the local occurrence of the White Box EEC would result in adverse effects such as to place at risk the long term survival of the EEC: at [109]-[110];

(f) the modest scale of the clearing required by the proposal relative to the extent and distribution of the White Box EEC, would not be a basis for an overall assessment of significant impact such as to require completion of a SIS. The test in s 5A(2)(g) was therefore not triggered: at [112];

(g) the proposal was not likely to significantly affect the White Box EEC and a SIS was not required: at [118]; and

(h) with the reduction and modification of the stockpile and handling area, and the conditions that would apply to a consent, the impact on the Squirrel Glider population was not likely to be significant. A SIS was therefore not required: at [127].

(2) impacts on caves, other karst features and cave dwelling fauna:

(a) it was likely that there were small, interconnected voids and fissures in the limestone to be quarried: at [152]. The presence of large caves was unlikely;

(b) although there was an absence of site-specific information on biota in the limestone, the presence of biota in caves and groundwater in the near vicinity of the site and the increasing number of studies elsewhere that established the presence of biota in the limestone and made it scientifically likely that some form of biota would be found within the limestone on site: at [177]; and

(c) it was beyond mere possibility that biota would be present and the scientific likelihood was sufficient to engage the precautionary principle. A step-wise or adaptive management approach was an appropriate response to the threat of environmental damage. This would involve the imposition of conditions of consent requiring monitoring linked to adaptive management: at [183]; and

(3) other issues:

(a) the proposal was consistent with the applicable zone objectives of the Rural "A" zone in Murrurundi Local Environmental Plan 2003: at [191]-[193]; and

(b) the proposed conditions of consent would sufficiently minimise and mitigate the adverse impacts of the proposal on surrounding land uses: at [192], [197]-[198].

- Abuse of Process

Nikolaidis v Pittwater Council [2009] NSWLEC 227; 171 LGERA 104 (Preston CJ)

Related Commissioner decision: *Nikolaidis v Pittwater Council* [2007] NSWLEC 678 (Tuor C))

Facts: the respondent, Pittwater Council, sought an order under Pt 13 r 13.4(1) of the Uniform Civil Procedure Rules 2005 that the appeal by the applicants under s 97(1) of the *Environmental Planning and Assessment Act* 1979 ('the Act') be dismissed as an abuse of process of the Court. The Council argued that the subject matter of the appeal - the "*continuation of raised parapets to eastern extents of roof and part of northern roof*" - was the subject of previous proceedings heard and determined by the Land and Environment Court.

The previous proceedings involved an appeal under s 96(6) of the Act against the refusal of an application to modify a development consent granted by the Council to construct a new dwelling. The modification sought to amend the approved plans to increase the height of the dwelling by adding a parapet.

In 2007, Tuor C approved the modification application in part to permit the parapet only so as to screen the air-conditioning unit, but otherwise required the parapet proposed for the rest of the dwelling to be deleted.

In 2008, the applicants lodged a development application with the Council seeking, in effect, to erect the remainder of the parapet that had been refused by Tuor C in the s 96(6) appeal. The Council refused the development application and the applicants appealed to the Court under s 97(1) of the Act.

Issues:

(1) whether the applicants' s 97(1) appeal was an abuse of process because it sought for the Court to grant consent to the same development that was previously refused in the s 96(6) appeal.

Held: dismissing the motion:

(1) the onus of satisfying the Court that there was an abuse of process lies upon the party alleging it. The onus was a heavy one: at [13], *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at 529 cited;

(2) the matters to be considered under s 96(3) in determining an application under s 96(2) to modify a development consent and the limitations on the power to approve such an application under ss 96(2), (3) and (4) were different to the matters to be considered under s 79C(1) when determining a development application and the power to approve a development application under s 80(1) of the Act: at [14];

(3) the "process" in the current appeal, under s 97(1) of the Act, was different to the "process" in the previous proceedings, which involved an appeal under s 96(6) of the Act. It was the repeated use of the same process that constituted an abuse of process: at [15];

(4) to use one process after having used the other process was not to make repeated applications; they were different applications and appeals. There was no express statutory limitation on being able to use one process after having used the other process. The statute allowed both processes to be used: at [19];

(5) the applicants' exercise of their statutory right to appeal under s 97(1) of the Act against a determination of the Council refusing their development application under s 78A(1) was not an abuse of process simply because the applicants had earlier exercised a different right of appeal under s 96(6) of the Act against a different determination of the Council of a different application under s 96(2) of the Act to modify an existing development consent: at [21];

(6) the overlap of issues in two different types of process did not necessarily cause the process that was second in time to be an abuse. The fact that the merit issue concerning the parapet increasing the height and bulk of the dwelling may have been raised, and factual findings may have been made in the s 96(6) appeal, and may again be raised and factual findings may need to be made in the s 97(1) appeal, did not necessarily result in an abuse of process: at [23]; and

(7) the Council had not discharged the onus of establishing that the applicants' s 97(1) appeal was an abuse of process: at [13] and [28].

- Environmental Offences

Department of Environment and Climate Change v Olmwood Pty Limited [2010] NSWLEC 15 (Pain J)

Facts: Olmwood Pty Limited pleaded not guilty to a charge of clearing native vegetation contrary to s 12(1) of the *Native Vegetation Act* 2003 (NV Act). Local residents, officers of Taree City Council and Hunter-Central Rivers Catchment Management Authority, and officers of the Department of Environment and Climate Change (DECC) gave evidence of serial clearing of the subject site over a number of years. Expert evidence on the date of European settlement and botanical pre-existence was called by the prosecutor. Part of the subject site had previously been occupied for sand mining under a mining lease held by earlier proprietors. Stereoscopic (3-D) viewing of aerial photography and SPOT5 satellite imagery showed signs of vegetation removal and soil disturbance, however regrowth activity could have masked the full extent of clearing. The defendant did not dispute any evidence in relation to aerial photography or SPOT5 imagery, however did dispute the extent of clearing alleged to have occurred in late 2006. The parties disputed the evidentiary onus for establishing whether re-growth had been cleared.

Issues:

(1) whether the prosecution was able to establish the elements of the offence; and

(2) who bears the evidentiary onus for establishing whether the vegetation that has been cleared was "regrowth" as defined in s 9 of the NV Act.

Held: convicting the defendant:

(1) the prosecutor had established beyond reasonable doubt that:

  (a) a substantial volume of vegetation was cleared across the whole of the property in December 2006: at [185]; and

  (b) the vegetation cleared was native vegetation within the meaning of s 6 of the NV Act: at [209];

(2) the defendant had the onus of proving on the balance of probabilities that the vegetation cleared on the property was "regrowth" as defined under s 9(2) of the NV Act in order to establish a defence: at [229];

(3) the prosecutor had negatived, on the balance of probabilities, a defence that the native vegetation cleared in December 2006 was "regrowth": at [259];

(4) the prosecutor had established beyond reasonable doubt that the clearing in December 2006 was not carried out in accordance with any development consent as provided in s 12(1)(a) of the NV Act: at [290]; and

(5) the defendant had not established on the balance of probabilities that the clearing was not caused by the defendant and accordingly under s 44 of the NV Act was taken to have carried out the clearing which gave rise to the offence under s12(1) of the NV Act: at [371].

- Air Pollution

Gray v Macquarie Generation [2010] NSWLEC 34 (Pain J)

Facts: the respondent carried on the business of wholesale generation of electricity, in particular from a coal-fired power station, Bayswater Power Station at Muswellbrook, under an environment protection licence issued pursuant to the *Protection of the Environment Operations Act* 1997 (the POEO Act). The applicants sought a declaration that the respondent wilfully or negligently disposed of waste by the emission of carbon dioxide (CO_2) into the atmosphere in a manner that harmed or was likely to harm the environment, in contravention of s 115(1) of the POEO Act, and an order that the respondent immediately cease disposing of waste through the emission of CO_2 into the atmosphere in contravention of s 115(1) of the POEO Act. The

respondent sought dismissal of the proceedings pursuant to r 13.4(1)(b) of the Uniform Civil Procedure Rules 2005 (the UCPR) that no reasonable cause of action was disclosed, on the basis that it had lawful authority to emit CO_2 into the atmosphere. The respondent submitted that the nature of electricity generation by coal-fired power stations resulted in the release of CO_2 when coal is burnt in oxygen. Given the inevitability of the emission of CO_2 it must have been considered by the Environment Protection Authority (the EPA) at the time of the grant of licenced consent, and therefore, it had lawful authority to emit CO_2 into the atmosphere. The applicants amended their points of claim to argue that even if the respondent had lawful authority to emit CO_2 it was only so authorised having reasonable regard for the interests of other persons and/or the environment and that such a limitation was to be implied in the licence, and it had at all material times failed to have such reasonable regard.

Issues:

(1) whether the proceedings should be summarily dismissed.

Held: upholding in part the respondent's application for summary dismissal:

(1) the applicants were unlikely to succeed on the claim that the respondent does not have lawful authority to emit unlimited amounts of CO_2. The correct understanding of the effect of the licence depended on a proper construction of the terms of the licence as a whole which must be determined as a matter of substance and context. The licence expressly authorised the carrying out of electrical power generation from coal in condition A1.2 and provided authority to undertake the scheduled activity of electricity generation on the conditions specified. The licence would have no sensible operation if the licence was construed as not allowing the emission of CO_2: at [58];

(2) the applicants were unlikely to succeed on the argument that CO_2 was waste under condition L5 of the licence: at [59]; and

(3) that part of the applicants' case based on limitation of statutory authority was arguable, and the respondent has not met the high threshold necessary of demonstrating that no reasonable cause of action existed in light of the applicants' amended points of claim: at [67].

- Evidence

Graymarshall Pty Ltd v Director-General of the Department of Environment, Climate Change and Water [2010] NSWLEC 54 (Pepper J)

Facts: the Department of Environment, Climate Change and Water (DECCW) was conducting an investigation as to whether or not there had been clearing of vegetation on property owned by Graymarshall Pty Ltd (Graymarshall). In furtherance of the investigation "the proper officer" of Graymarshall was issued with a notice pursuant to s 36 of the *Native Vegetation Act* 2003 by an officer of DECCW to provide information and documents in respect of a potential unlawful clearing of native vegetation on the property. The notice contained a warning that the fact that information and documents required by this notice might incriminate the recipient or make the recipient liable to a penalty does not excuse the recipient from having to comply with the notice. It also stated that if the recipient was a natural person information and/or documents obtained under the notice would not be admissible in evidence against the recipient in criminal proceedings, except for an offence under s 36 of the Act, including the offence of knowingly answering a question falsely or in a way that is misleading in a material particular. No proceedings had been commenced against Graymarshall or any other person.

Issues:

(1) whether or not the applicant was entitled to refuse production of the documents and information requested in the notice on the basis that it was protected by the privilege against exposure to penalties.

Held: dismissing the application:

(1) the privilege against exposure to penalties did not apply to corporate entities. The notice was issued to Graymarshall and not to its directors or any other persons concerned with the management of the company: at [4];

(2) the proper construction of ss 36 and 45, the latter of which deems directors and managers of a company liable for corporate contraventions, precluded the availability of the privilege to Graymarshall. First, as a separate legal entity Graymarshall had an independent obligation to comply with any notice served upon it pursuant to s 36: at [33]. Secondly, the obligation on Graymarshall was no different than that of a corporation required to comply with a subpoena to produce notwithstanding that the subpoena is addressed to "the proper officer". Just as the corporation has an obligation to produce the material the subject of the subpoena irrespective of whether or not the material produced may tend to incriminate particular individuals within that company, a similar obligation existed on Graymarshall to answer the s 36 notice: at [34];

(3) the fact that the conviction of a corporation may lead to the conviction of the corporation's directors or managers if proceedings are commenced against the corporation did not detract from the corporation's obligations to comply with a notice served on it pursuant to s 36: at [37]. Read in light of the objects of the Act contained in s 3, it is clear that the objective purpose of Pt 5 of the Act is to confer on the Director-General wide investigatory powers which necessarily included the power contained in s 36 to compel the production of information and material specified in any notice issued pursuant to it. Section 36 ought not be given a narrow interpretation which would result in "absurdity": at [43];

(4) s 36(6) ought to apply to all natural persons irrespective of whether the notice is issued to a natural or corporate entity: at [45];

(5) the privilege was not available in the context of non-judicial investigative proceedings where DECCW merely sought the provision of information in order to determine if a contravention of the Act had occurred: at [4]; and

(6) nothing about the notice was misleading insofar as it made express reference to the privilege against self incrimination but no reference to the privilege against exposure to penalties. The language in the notice was not inaccurate and, in any event, no evidence was presented to the Court demonstrating that Graymarshall had been misled: at [55].

- Practice and Procedure

Wollongong City Council v Falamaki [2010] NSWLEC 1081 (Craig J)

Facts: in 1997 the Council claimed that work done for the completion of a dwelling was being undertaken not in accordance with the approval. Proceedings were commenced by it. Talbot J made orders to resolve the proceedings on 17 February 1999 (the 1999 orders). These orders were appealed unsuccessfully by Dr Falamaki to the Court of Appeal and to the High Court. In May 2009, Dr Falamaki filed a motion in the Court seeking to vacate one of the 1999 orders. Pain J extended the time for complying with the 1999 orders (the 2009 orders). Dr Falamaki sought to set aside both the 1999 and the 2009 orders in this Court on the basis that there was fresh evidence that the Council had in effect perpetrated a fraud. Sheahan J dismissed the motion with costs. Dr Falamaki then sought a stay of both the 1999 and 2009 orders and an order that they be set aside on grounds similar to those before Sheahan J.

Issues:

(1) whether the 1999 and 2009 orders were final; and

(2) whether "special" or "exceptional" circumstances could be established to set aside those orders pursuant to Pt 36 r 15 of the Uniform Civil Procedure Rules 2005.

Held: dismissing the application:

(1) the 1999 and 2009 orders were final orders of this Court;

(2) the so-called fraud and delay asserted by Dr Falamaki was generally misconceived and did not form a proper basis for the setting aside of the orders;

(3) judgments could not be set aside by reason of inadvertence to tender evidence or ignorance of evidence seen years after the determination to be potentially relevant to an issue agitated at the original hearing: at [81];

(4) Dr Falamaki was bound by the manner in which he conducted the proceedings before Pain J in 2009: at [124];

(5) the discretion available under Pt 36 r 15 was to be exercised with considerable caution given the primacy of the statutory provision speaking of the finality of judgments and orders: at [126]; and

(6) the absence of explanation for the lack of action taken by Dr Falamaki between 2002 and 2009 weighed heavily against the exercise of discretion and spoke strongly in favour of the finality of judgments as an important element of the administration of justice as did the fact that he availed himself of two opportunities in 2009 to impugn the orders the subject of the application: at [128].

Olsson v Goulbourn Mulwaree Council & The Minister Administering The Crown Land Act 1989, Olsson v The Minister Administering The Crown Land Act 1989 [2010] NSWLEC 47 (Craig J)

Facts: the applicant sought development consent to erect a number of 'rural workers dwellings' on a large rural holding. They held that land as lessees from the Crown. In his capacity representing the Crown as owner of the land the consent of the Minister to the making of the development application was sought by the applicant. The Minister refused to provide that consent. The Minister and the Council sought orders for the separate determination of issues pursuant to Pt 28 r 2 of the Uniform Civil Procedure Rules 2005.

Issues:

(1) the first notice of motion, filed by the Minister, identified two questions. First, whether the Court had jurisdiction to order the Minister to provide consent to the development application. Second, whether the purpose of the lease into which the parties had entered prevented the Minister from consenting to the development application; and

(2) the second notice of motion, filed by the Council, identified one question: whether the operation and effect of the applicable local environmental plan rendered the proposed development as prohibited.

Held: the first notice of motion was dismissed. The second notice of motion was upheld in part:

(1) the principles pertaining to the making of an order pursuant to Pt 28 r 2 of the Uniform Civil Procedure Rules 2005 articulate the need to save time and expense. Single-issue separate trials should only be undertaken when their utility, economy and fairness to the parties are beyond question: at [12];

(2) it was contended by the applicants and accepted by the Minister that in order to address the questions identified in the first notice of motion, it would be necessary to canvass the detail of the application including the evidence of experts. The evidence that would need to be adduced would also be relied upon to address other issues in the proceedings including merit issues. The prospect of duplication in evidence made the separate determination of the question inappropriate. Separate determination of the second question is equally inappropriate because it would require the Court to consider the same evidence as would be necessary to consider the first question: at [17]. The notice of motion was dismissed: at [21]; and

(3) the point raised by the Council's notice of motion turned upon the proper interpretation of a single provision of the local environmental plan in the context of an uncontroversial fact. If determined in accordance with the Council's interpretation of the provision, it was accepted by the applicants that their appeal must fail. That issue was therefore appropriate for separate determination. The notice of motion was upheld in part: at [26].

- Costs

ROI Properties Pty Ltd v Council of City of Sydney [2010] NSWLEC 22 (Pain J)

Facts: the parties participated in a conciliation conference under s 34(1) of the *Land and Environment Court Act* 1979 (the Court Act). The applicant's solicitor had appeared at the s 34 conference with four expert witnesses and two representatives of the applicant company; the Council was represented at the s 34 conference by its solicitor only. The applicant filed a notice of motion seeking its costs of the preparation for and attendance at the s 34 conference. There was evidence of the steps taken by both parties in preparation for the s 34 conference in the form of affidavits of the parties' solicitors. The applicant objected to the reading of the paragraph of the affidavit of the Council's solicitor in which he attested to what occurred at the s 34 conference, and it did not put on any evidence from the solicitor who attended the conference on its behalf.

Issues:

(1) whether costs thrown away in preparing and attending a s 34 conference ought to be awarded.

Held: standing over the application:

(1) under s 34(11) of the Court Act no evidence of anything said at the s 34 conference can be referred to in the hearing unless there was agreement to do so by both parties under s 34(12) of the Court Act. There was no such agreement. The result was that neither party could make submissions supported by evidence of what occurred at the s 34 conference to advance their respective cases and without that evidence the determination of costs occurred in a partial vacuum: at [12];

(2) by virtue of the Council's preparation and instructions to its solicitor, the matters it considered could be addressed at the conference were narrower than the applicant intended but that did not mean there had been a lack of good faith in the conciliation process on the Council's part as required by s 34(1A) of the Court Act: at [15]; and

(3) final determination of any notice of motion seeking costs was stood over until the substantive class one matter had been decided.

- Section 56A Appeals

Ekermawi v Bennett (No 2) [2010] NSWLEC 40 (Preston CJ)

First instance Commissioner decision: *Ekermawi v Bennett* [2009] NSWLEC 1398 (Fakes C*)*

Facts: The Commissioner dismissed Mr Ekermawi's application under the *Trees (Disputes Between Neighbours) Act* 2006 to have a tree growing on his neighbour's land removed and for compensation for damage caused to Mr Ekermawi's property.

Issues:

(1) misdirection as to the law: whether the Commissioner misinterpreted and misapplied s 10(2) of the *Trees (Disputes Between Neighbours) Act* and the Court's decisions in *Yang v Scerri* [2007] NSWLEC 592 and *Barker v Kyriakides* [2007] NSWLEC 292. Mr Ekermawi submitted that the Commissioner conflated the two tests in ss 10(2)(a) and 10(2)(b) by using the temporal requirement "in the near future" to qualify "likely" and on a proper construction the section did not permit such use;

(2) no evidence: whether there was no evidence to support the Commissioner's finding of fact that none of the tests in s 10(2) of the *Trees Act* had been satisfied. Mr Ekermawi focused on the Commissioner's finding that "there is no evidence of any damage to any vehicle parked on the applicant's property" and submitted that there was no evidence to support this finding;

(3) denial of procedural fairness: whether the Commissioner, by declining an invitation to enter Mr Ekermawi's house to inspect internal damage, which he asserted was caused by the tree, denied him the right to be heard. Mr Ekermawi also submitted that he was not given adequate opportunity to address

the Commissioner on the decision in *Black v Johnson (No 2)* [2007] NSWLEC 513 and that the Commissioner had failed to address the decision in her judgment; and

(4) costs: whether it would be fair and reasonable for Mr Ekermawi to pay the respondent's costs of both the 56A(1) appeal and of that part of the original proceedings before the Commissioner that related to the claim for compensation that was subsequently withdrawn. Referring to Pt 3 r 3.7(f) of the Land and Environment Court Rules 2007 and the failure of Mr Ekermawi to file any further evidence in relation to the compensation claim despite a Court direction, the respondents submitted that Mr Ekermawi's claim did not have reasonable prospects of success.

Held: dismissing the appeal:

(1) there was no error of law revealed in the Commissioner's interpretation of s 10(2) or in the reference to the Court's decisions in *Yang v Scerri* and *Barker v Kyriakides*: at [23]-[25], [29]. The judgment revealed a clear understanding that there were two limbs to s 10(2): at [21]. The Commissioner's finding of fact that none of the tests in s 10(2) were satisfied was not dependant on any temporal requirement and the reference to the *Yang v Scerri* was only for the purpose of explaining the temporal qualification referred to in the first limb. The temporal requirement was not a central issue in the Commissioner's decision and even if there was a misconstruction of s 10(2)(b) by the Commissioner's reference to the "near future" this would not vitiate the Commissioner's decision. The factual finding that none of the tests in s 10(2) were satisfied was open to the Commissioner on the evidence and there was no error of law revealed by the Commissioner referring to the decision in *Barker v Kyriakides*: at [29];

(2) construed in the context of the paragraph and the judgment as a whole, the impugned sentence is an inference of fact that was open to the Commissioner on the evidence. Whether or not the Commissioner's inference was factually correct is irrelevant. It was an inference of fact that had an evidentiary basis and is unassailable on an appeal under s 56A(1) limited to questions of law: at [36];

(3) no error of law occurred by the Commissioner declining the applicant's invitation to inspect his house. The Commissioner was not under a duty, whether by reason of the rules of procedural fairness or otherwise, to accept the invitation to inspect internal damage to the house: [41]. The applicant was given adequate opportunity to address the commissioner on *Black v Johnson* and the Commissioner was not under any obligation to refer to that decision in the reasons for judgment: at [42]-[44]. The Commissioner was not required in the reasons for judgment to recount and reject every submission made by the applicant in argument regardless of the nature, central relevance or strength of the submission, its potential effect on the outcome of the decision and the individual circumstances of the case: at [47]; and

(4) it was fair and reasonable for the applicant to pay the costs of the respondents for the s 56A(1) appeal: at [61]. However, the circumstances were not such as would make it fair and reasonable to order the applicant to pay the whole or any part of the costs relating to the original proceedings before the Commissioner: at [62]. Neither the applicant nor the respondent filed additional evidence in relation to the claim for compensation and as a result the withdrawal of the claim for compensation made no difference to the evidence. The applicant's choice to not file any further evidence was not unreasonable and the respondents suffered no loss such as the costs of having prepared evidence that was no longer required: at [64]-[66].

Warnes v Muswellbrook Shire Council [2010] NSWLEC 19 (Pain J)

First instance Commissioner decision: *Warnes v Muswellbrook Shire Council* [2009] NSWLEC 1284 (Moore SC)

Facts: the applicant appealed under s 97(1) of the *Environmental Planning and Assessment Act* 1979 (EPAA) against the refusal of development consent by Muswellbrook Shire Council for proposed accommodation for construction workers near Muswellbrook, being 14 buildings to house 400 workers. Moore SC dismissed the appeal on the ground that the proposal was not consistent with the objectives of the Muswellbrook Local Environmental Plan 1985 (the LEP) for the L2 zone as required by cl 8 of the LEP, in particular objective (b) , being "to accommodate development …which requires a location close to the town of

Muswellbrook…". The Senior Commissioner construed the word "requires" as requiring the applicant to demonstrate that it is not practicable or appropriate to locate the proposed development other than close to a town.

Issues:

(1) whether the Senior Commissioner erred in law in misdirecting himself in construing the words "development which requires a location close to the town of Muswellbrook".

Held: dismissing appeal:

(1) generally, a provision in an LEP must be construed in light of its context and purpose (see *Interpretation Act* 1987, s 33), and a failure to properly construe "require" in the phrase used in the LEP could give rise to an error of law: at [10];

(2) the Senior Commissioner's approach to "require" was a practical and commonsense approach given the nature of objective (b) and his construction was correct in the context of the LEP and the objectives of the L2 zone (*Sutherland Shire Council v Telope Pty Ltd* (1993) 85 LGERA 103 distinguished): at [11]; and

(3) the approach to "require" was not an approach based on an absolute imperative, but rather reflected an approach in the context of a planning instrument of considering whether, as a practical matter, a development should be located near a town: at [14].

The Village McEvoy Pty Limited v Council of the City of Sydney (No 2) [2010] NSWLEC 17 (Pepper J)

First instance Commissioner decision: *The Village McEvoy Pty Ltd v City of Sydney Council* [2009] NSWLEC 1232 (Bly C)

Facts: the Village McEvoy Pty Limited had lodged a development application for a four level building that would contain a mix of commercial and retail uses, parking spaces and a public square. This site was located within Green Square Town Centre which was to be developed as a major centre in accordance with the State Metropolitan Strategy. The Commissioner considered the relevant provisions of the *Environmental Planning and Assessment Act* 1979 and the applicable planning controls. He had regard to the Green Square Urban Renewal Area Background Paper, The Green Square and Southern Areas Retail Study and The Green Square Urban Renewal Area Transport and Accessibility Plan 2008. The Commissioner refused the proposed development because it was inconsistent with the Retail Hierarchy recommended in the adopted Retail Study. The Commissioner also took into account that there was a planning intent to rezone the proposed development site from mixed-use to general industrial, which would prohibit the proposal in the new zone.

Issues:

(1) whether consideration of the City Plan, Retail Study and Background Papers were erroneously considered and vitiated the Commissioner's decision;

(2) whether the Commissioner failed to apply the correct test required by s 79C(1)(b) in relation to the adverse impacts on possible future development in Green Square because he did not consider whether there was going to be a resultant community detriment which would not be made good by the proposed development;

(3) whether the adverse economic impact of the development on possible future development in Green Square was an irrelevant consideration;

(4) whether it was an error of law to consider the objects in s 5(a)(ii) of the EPAA under s 79C(1);

(5) whether the Commissioner failed to give proper, genuine and realistic consideration to cl 21E(1) and (3) of the 1998 LEP;

(6) whether the Commissioner erred by assessing the proposed development against the wrong objectives, namely, the strategic planning intent for the area rather than the objectives of Zone 10(e) – the Mixed Uses "E" Zone pursuant to cl 21E(1) of the 1998 LEP;

(7) whether the Commissioner erred by misapplying the evidence, or in the alternative, by making a finding of fact for which there was no evidence by assuming that the planning intent to rezone the site industrial was "inevitable" in the absence of any council resolution;

(8) whether the Commissioner erred because he misconstrued "the present planning intent" for the area by not having recourse to the statutory planning controls currently applicable to the subject site being the 1998 LEP and the 1997 DCP; and

(9) whether the Commissioner failed to take into account, or failed to give reasons for rejecting the applicant's submissions on the effect the proposed development would have on competition when considering the public interest pursuant to s 79C(1)(e) of the EPAA.

Held: dismissing the appeal:

(1) the matters that a consent authority must take into consideration if they are applicable are set out in s 79C of the EPAA. This did not exclude from consideration other matters of relevance, including matters in the public interest. On this basis the City Plan was a relevant consideration: at [38];

(2) the Background Paper and Retail Study were substantial and relevant policy documents to which the Commissioner was entitled to have regard in considering the public interest of the proposed development. The weight given to these documents in determining the development application did not vitiate the decision: at [48]. The Commissioner was aware that the Background Paper and Retail Study and various Planning Committee resolutions were not environmental planning instruments but were "in the public interest, important policy documents against which the proposed development must be assessed": at [49];

(3) the Commissioner was required to consider "the circumstances of the case and the public interest" in accordance with s 39(4) of the *Land and Environment Court Act* 1979. This included the council's intention to rezone the site and was given appropriate weight by acknowledging that the LEP had not been set aside nor was the rezoning imminent: at [50];

(4) the Commissioner was not confident that the proposal would be able to make good the resultant community detriment: at [61].

(5) the Commissioner dismissed the planning appeal not because the proposed development could have an economic impact upon private individual traders, but because of planning issues that had a significantly wider economic import: at [64]. The effect of the proposed development on the land market, on the orderly development of the Town Centre, on the Retail Hierarchy, on the community and on present investments, especially during the start-up phases, were all appropriate and relevant matters for consideration: at [65];

(6) the Commissioner's consideration of the adverse economic impact of the proposed development was in accordance with the "broader construction" of s 79C(1)(b): at [60];

(7) the Commissioner did not measure the development against the objects of the EPAA as a matter relevant to be considered under s 79C(1)(e). The Commissioner considered whether the proposed development met the objects of the Act given that it did not represent the orderly and economic use of the development of the land and in relation to strategic town planning consideration, would not be in the public interest. This was not used as a test by the Commissioner but rather was an expression of his view that it did not further the development application: at [71];

(8) the Commissioner's decision reveals that the Commissioner was mindful of the current objectives of Zone 10E as set out in cl 21E. His consideration of these objectives amounted to more than "mere lip service". However, balanced against his consideration of cl 21E was the Commissioner's consideration of the proposed zoning provisions in Zone 11A, cl 27A, cl 27B and Sch 4 of the 1998 LEP: at [80];

(9) the City Plan, the 1997 DCP, the Retail Study and the Accessibility Plan, were all relevant considerations in the Commissioner's assessment of the development application: at [80]. The Commissioner balanced the existing planning controls against the future planning strategy for the Town Centre and gave them the weight he considered appropriate given the intent of the council: at [81];

(10) though there was no actual resolution of the council to rezone the site and surrounding area, there was ample evidence of the council's intention to effect rezoning as part of the City Plan: at [86]; and

(11) the Commissioner had regard to the applicant's submissions concerning competition and rejected them because in his view the issue was "not about competition between supermarkets but instead about the considered determination of appropriate locations for them within the well-understood and accepted concept of a retail hierarchy": at [98].

Walfertan Processors Pty Limited v Upper Hunter Shire Council (No 3) [2010] NSWLEC 28 (Pain J)

First instance Commissioner decision: *Walfertan Processors Pty Limited v Upper Hunter Shire Council* [2009] NSWLEC 1134 (*Walfertan No 1*) (Moore SC)

Facts: the Senior Commissioner allowed the joinder of the second respondent, Darley Australia Pty Ltd and WJ Bourke pursuant to s 39A of the *Land and Environment Court Act* 1979 (the Act) to class one proceedings. The substantive appeal was subsequently decided in favour of the applicant in *Walfertan Processors Pty Limited v Upper Hunter Shire Council* [2009] NSWLEC 1260 (*Walfertan No 2*)(Moore SC and Taylor C). The second respondent filed a s 56A appeal to set aside the grant of development consent based on alleged legal error concerning whether the proposed development was designated development. The applicant subsequently commenced a separate s 56A appeal against the interlocutory joinder decision in *Walfertan No 1*. It was agreed that the applicant's s 56A appeal was filed out of time, and the applicant sought leave to appeal out of time. The applicant submitted that its appeal was competent as it was able to be considered as part of the separate s 56A appeal lodged by the second respondent against the final decision of the Commissioners. In the alternative, the applicant submitted it could file a s 56A appeal against an interlocutory order or a decision of a commissioner on a question of law. The second respondent argued that the appeal was incompetent as it was an appeal against an interlocutory order and that s 56A of the Act only permitted appeals against a final order or decision.

Issues:

(1) whether the applicant's s 56A appeal was competent, being an appeal against an interlocutory decision of a commissioner; and

(2) if competent, whether an appeal filed out of time should be allowed.

Held: dismissing the appeal:

(1) the applicant was not appealing the final decision of the Commissioners, it being successful in obtaining development consent. It could not "piggy-back" on the second respondent's s 56A appeal to enable it to ground its cross appeal: at [12];

(2) an appeal against an interlocutory order or decision on a question of law made by a commissioner falls within the scope of s 56A of the Act: at [14]; and

(3) while the appeal was competent, leave to file the appeal out of time should not be granted on the grounds that it would have been more appropriate to have resolved the issue earlier rather than well after the final decision of the Commissioners when all the parties had participated in every phase of the hearing and the second respondent would be prejudiced in relation to its costs motion if leave to appeal out of time was granted: at [18]-[19].

Manly Council v BSDI Pty Limited [2010] NSWLEC 31 (Pepper J)

First instance Commissioner decision: *BSDI Pty Limited v Manly Council* [2009] NSWLEC 1067 (Murrell C)

Facts: Manly Council refused a development application for the construction of a two-storey childcare centre and car park in Seaforth. The Council's decision was appealed and the Commissioner approved the proposed childcare centre subject to conditions. The Council challenged the Commissioner's decision on the basis that she: failed to take into account the SEPP (Infrastructure) 2007; misconstrued the SEPP; failed to

take into account the Manly LEP; misconstrued the LEP and failed to give adequate reasons. While the Commissioner had referred to cl 10 of the LEP and the objectives of the residential zone, she had not referred to the SEPP in her reasons.

Issues:

(1) whether the Commissioner properly considered and determined all the issues raised before her in approving the development application;

(2) whether the Commissioner was only required to consider the material and arguments as presented to her by the parties; and

(3) whether the Commissioner provided adequate reasons.

Held: dismissing the appeal:

(1) the Council was bound by the way it conducted its case and the narrowing of the issues by it before the Commissioner: at [39];

(2) the conduct of the Council before the Commissioner revealed that while the Commissioner was made aware of the existence of the SEPP, it was the substance of the contentions emanating from specific clauses which fashioned the contest between the parties and not the specific mechanics or language of the instrument: at [37]. That is to say, it was the subject matter, and not the form, of particular clauses of the instruments that were, having regard to the conduct of the proceedings, joined in issue (*Bankstown City Council v Mohamad El Dana* [2009] NSWLEC 68). Having adopted this course, the Council was bound by it: at [39]. Accordingly, the failure by the Commissioner to advert to the terms of the SEPP or to express her conclusions as to matters raised for consideration in terms other than those contained in the SEPP, was not of itself indicative of error: at [40]. The Commissioner's attention was directed to specific matters for consideration and it was therefore these matters which the Commissioner was bound to consider and determine: at [43];

(3) in determining whether the Commissioner had provided adequate reasons, the judgement had to be read not only in the context of the decision as a whole, but also in the context of the conduct of the parties: at [78]. The content of the requirement to furnish reasons varies according to the nature and circumstances of the case and the manner in which it is conducted: at [80]; and

(4) the Commissioner was not bound to do more than decide the Council's contentions in the manner in which they were presented to her. The issues put before the Commissioner coincided with the subject matter of the SEPP and LEP respectively. To the extent that these issues ultimately proved to be contentious, the Commissioner considered them and either formed an opinion or was satisfied that consent ought to be granted for the carrying out of development. This was sufficient in all the circumstances: at [82].

Martin v Director-General, New South Wales Department of Industry and Investment [2010] NSWLEC 21 (Pain J)

First instance Commissioner decision: *Martin v New South Wales Department of Industry and Investment* [2009] NSWLEC 1447 (Dixon C)

Facts: the appellant commenced proceedings concerning the refusal to renew two exploration licences and the refusal of two new exploration licences under the *Mining Act* 1992. Commissioner Dixon was considering the appellant's Notice of Motion seeking leave to file an amended summons, the Crown's motion to have the proceedings struck out under r 13.4 of the Uniform Civil Procedure Rules 2005, and the appellant's application during the hearing for injunctive relief on the same ground as the summons. The Commissioner held that the proceedings were frivolous and vexatious, disclosed no reasonable cause of action and were an abuse of process, and dismissed those proceedings pursuant to r 13.4 of the UCPR.

Issues:

(1) whether an error of law as required by s 56A of the *Land and Environment Court Act* 1979 was identified.

Held: dismissing the summons:

(1) there was no error of law identified in the summons filed by the appellant: at [7]; and

(2) leave to file an amended summons should not be granted, for the following reasons:

(a) the appellant had been given the opportunity to seek legal advice by the Commissioner and this matter was specifically raised during the original proceedings: at [9];

(b) even if the appellant were granted an opportunity to amend this summons to articulate an error of law, it would be unlikely to cure the fundamental problems with the appellant's pleadings in the original proceedings: at [10];

(c) the appellant's efforts were better directed to commencing fresh proceedings prepared with the benefit of legal advice that identify the respondent correctly, relate to exploration licences relevant to this appellant and properly articulate matters which this Court could hear under s 293 of the *Mining Act*: at [11]; and

(d) there did not appear to be any substantial prejudice to this appellant in challenging matters relevant to the exploration licences granted or refused in relation to him if the order that the proceedings be dismissed was made: at [14].

Puruse v City of Sydney Council (No 3) [2010] NSWLEC 35 (Sheahan J)

First instance Commissioner decision: *Puruse Pty Ltd and Joao Pty Ltd trading as Coopers Hotel, Newtown v Sydney City Council* [2009] NSWLEC 1095 (Hoffman C)

Facts: the applicant appealed under s 56A of the *LEC Act* against the decision of Hoffman C to dismiss an application under s 96 of the *EPA Act* to modify conditions of consent: [2009] NSWLEC 1095 (2 April 2009).

The appeal before the Commissioner sought to make permanent the extended trading hours of two outdoor areas of the Coopers Hotel in Newtown. The council in 2006 had granted consent to a 12 month trial period for the extended hours for the outdoor areas. The s 96 application (before the council and the Commissioner) sought to make those trading hours permanent.

The council had determined to impose a further 2 year trial period of extended hours. Hoffman C in effect agreed and dismissed the appeal.

In dismissing the appeal, the Commissioner had applied the council's Late Night Trading Premises Development Control Plan 2007 (the DCP), which provides for "rolling" trial periods in granting extended trading hours. The DCP came into operation on 1 January 2008, before the s 96 application to council made on 7 February 2008 but after the original grant of consent in 2006.

Clause 2.3 provided the DCP applies to "development applications for new and existing category A and category B premises". An explanatory note after cl 2.3 provided that "this DCP is not retrospective nor does it derogate from existing consents".

Conditions in the 2006 consent relating to the trial of extended trading hours provided that "Council's consideration of a proposed continuation and/or extension of the hours permitted by the trial will be based on, among other things, the performance of the operator in relation to the compliance with development consent conditions, any substantiated complaints received and any views expressed by the Police."

Issues: the applicant raised the following legal errors by the Commissioner:

(1) the application of the DCP despite the explanatory note;

(2) the application of the DCP despite the conditions of consent limiting relevant material to be relied upon for the consideration of proposed extended trading hours; and

(3) making findings that amenity impacts were in "fine balance" despite no evidence supporting that finding.

The council contended that those issues raised in relation to the DCP's application could not be relied upon in the s 56A appeal as they were not raised before the Commissioner. The council contended the Commissioner was not in error.

Held: dismissing the appeal:

(1) the DCP being a "mandatory relevant consideration" under s 79C (1)(a)(iii) of the EPA Act required the Commissioner have regard to it in modification of consents under s 96(3): at [32];

(2) the explanatory note in the DCP did not form a substantive term: at [42];

(3) in any event, the issues concerning the DCP were not raised before the Commissioner. Therefore the first ground of appeal could not succeed: at [36]-[41]; and

(4) the Commissioner's findings of fact were based on evidence summarised in his judgment. Therefore, no error of law had been committed: at [51].

Commissioner Decisions

- Development Application Appeals under s 97 of the EPAA

Premier Customs Services Pty Ltd v Botany City Council [2010] NSWLEC 1052 (Dixon C)

Related decision: *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 (Ipp, McFarlan JJA and Hoeben J)

Facts: this was a class one appeal in respect of a development application for consent to construct a two-storey industrial building for use as an "air freight forwarder". The matter had been remitted for determination in accordance with the decision of the Court of Appeal. The Council was granted leave to file an amended Statement of Facts and Contentions. Clause 17(1) of the Botany Local Environmental Plan 1995 (the LEP) requires the consent authority to be satisfied of a number of matters, including that the development provides (a) adequate off-street parking; (b) an efficient and safe system for the manoeuvring, loading and unloading of cars; (c) that there is sufficient area onsite for the storage and parking of vehicles associated with the operation of the development, and (d) the design and operation of the development will protect the visual and aural amenity of adjoining non-industrial uses. The proposal included three off street parking spaces within the front setback of the building and a vehicle turntable to allow all vehicles to leave the site in a forward direction. The applicant proposed a plan of management which included provisions relating to the size and make of vehicle delivery trucks, the number of deliveries, and the movement of vehicles on site.

Issues:

(1) whether the site was suitable for the development or the development is an overdevelopment of the site.

Held: dismissing the appeal and refusing consent:

(1) the identified car parking needed for the development was three car spaces, however, practically the development provided two car spaces because the third needed to be kept free to enable access to the loading bay: at [36]-[37];

(2) the workability of the use relied upon strict compliance with the plan of management, however, it was unlikely that there would be strict compliance and the result would be an adverse impact on the amenity of the adjoining residence and the neighbourhood generally: at [38]; and

(3) the inability of the development to deal adequately with the parking, loading and manoeuvring provisions in cl 17(1) of the LEP meant that in terms of s 79C(1)(c) of the *Environmental Planning and Assessment Act* 1979 the site was not suitable for the development: at [41].

Southern Cross Enterprise Group Pty Ltd v Parramatta City Council [2010] NSWLEC 1051 (Brown C)

Facts: this was a class one appeal in respect of a development application for consent to demolition of an existing church hall, construction of a 50 bed hotel, and use of an existing church building in association with the hotel as a restaurant and bar, in Church Street, Parramatta. The church and church hall were identified in Schedule 5 of Parramatta City Centre Local Environmental Plan 2007 (the LEP) as heritage items of State significance. Clause 35(2) of the LEP required consideration of a range of matters for demolition of a heritage item; cl 35(9) provided that a consent authority may grant consent for any purpose of a building that is a heritage item even though development for that purpose "would otherwise not be allowed" by the LEP if the consent authority was satisfied of a number of specified matters.

Issues:

(1) whether the church hall should be demolished;

(2) whether cl 35(9) was the sole basis for assessment of a development application relating to a heritage item or whether other controls in the LEP such as the height control would apply; and

(3) whether the proposal satisfied the requirements of cl 35(9) of the LEP.

Held: dismissing the appeal and refusing consent:

(1) adequate consideration had not been given to the consideration of options that may lead to the retention or adaptive reuse of the church hall: at [26];

(2) even if cl 35(9) were the sole basis for assessment, the requirements in cl 35(9)(a) to (e) would have to be satisfied: at [34];

(3) the proposed hotel building had an unacceptable impact on the heritage significance of the church and its setting, and cl 35(9)(d) was not satisfied: at [54], [57];

(4) because of the unacceptable impact on the curtilage and setting of the church, the requirement in cl 35(9)(a1) that the additional value that contravention of a development standard, in this case relating to height, would add to the development be consistent with the value of conserving the heritage item was not satisfied: at [66];

(5) the design of the proposed development was in direct conflict with the requirements of Policy 16 of the Conservation Management Plan prepared for the applicant and cl 35(9)(c) was not satisfied: at [69]; and

(6) while the granting consent would facilitate the conservation of the fabric of the church, if conservation is considered in a wider context it could not be said that the conservation of the heritage item would be facilitated by the granting of consent, particularly as the heritage item on the land where the hotel was proposed to be constructed is to be demolished and not conserved, and cl 35(9)(a) was not satisfied: at [73].

New Developments

In *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082, Moore SC reconsidered the planning principle on solar access published in *Parsonage v Ku-ring-gai* [2004] NSWLEC 347; (2004) 139 LGERA 354. As a consequence, the planning principle in *Parsonage* has been set aside and replaced by the revised planning principle on solar access in *The Benevolent Society*.

Court News

Departures

The Court farewelled Trevor Bly who retired on 19 February 2010.

Arrivals

The Court welcomed Craig J who was appointed on 2 March 2010.